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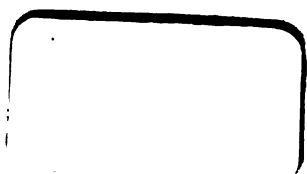
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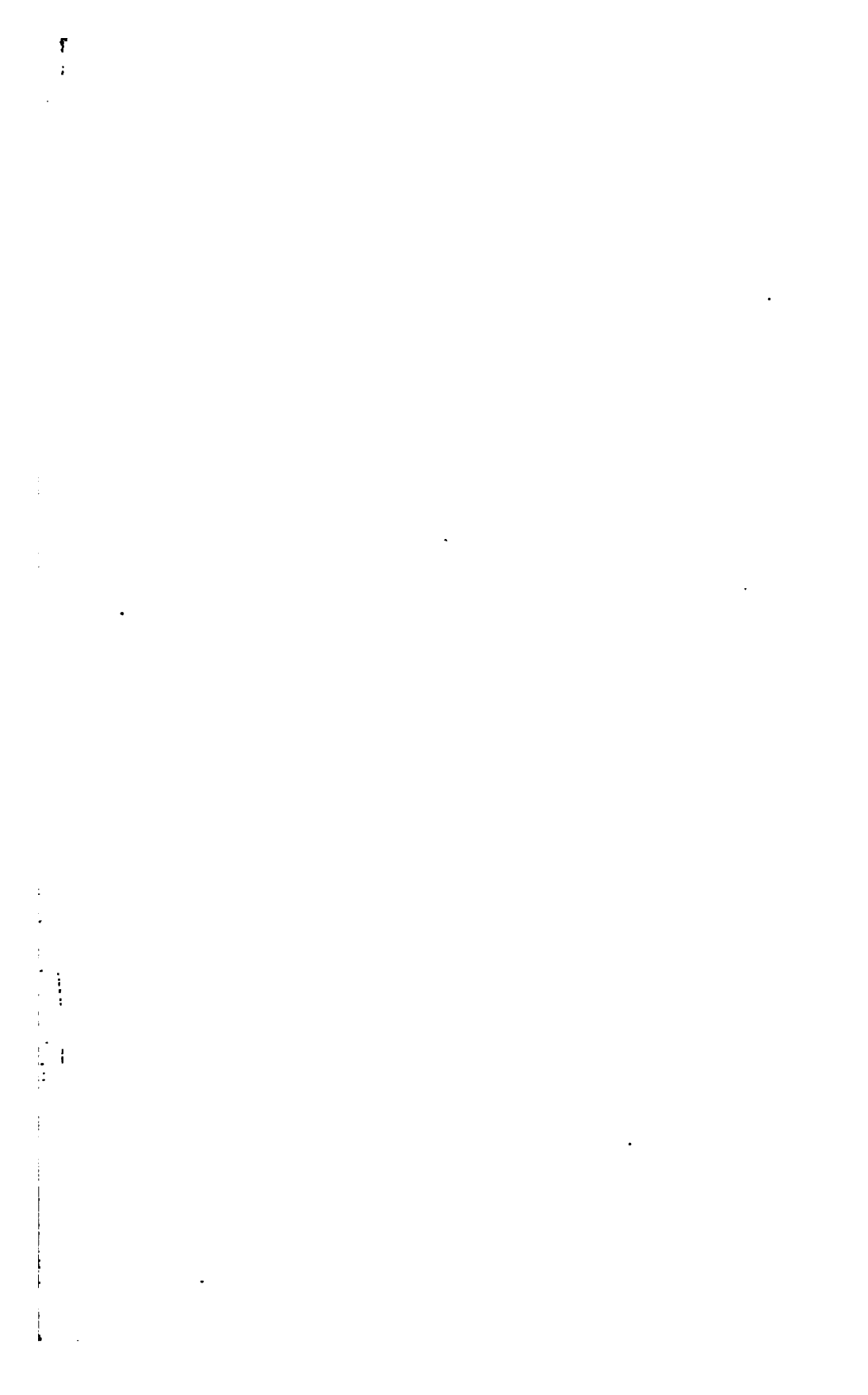
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# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## SUPREME COURT, AT SPECIAL TERM,

WITH THE

POINTS OF PRACTICE DECIDED,

FROM

December Term, 1845, to September Term, 1848.

~~~~~  
BY NATHAN HOWARD, JR.,

COUNSELLOR AT LAW AND DEPUTY CLERK OF THE SUPREME COURT.  
~~~~~

VOL. II.

0  
ALBANY:

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Entered, according to Act of Congress, in the year eighteen hundred and fifty-nine,

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In the Clerk's Office of the District Court of the Southern District of New-York.

SEP 27 1929

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# PRACTICE REPORTS.

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## SUPREME COURT.

JOHN M. FLINT administrator, &c. agt. RICHARD H.  
MOREHOUSE.

It is not necessary to state the residence of counsel in an affidavit for a motion for leave to reply double; it is only necessary to show by affidavit, that the matters sought to be replied *are true*. The 63d rule only applies where the advice of counsel *is necessary*.

*December Term, 1845.*

Motion for leave to reply double to defendant's special pleas.

The declaration contained the common counts for work and labor, board, lodging, tuition, &c. Pleas, several issues, statute of limitations (non-assumpsit, *infra sex annos*) and infancy. Plaintiff moved for leave to reply to the plea of the statute of limitations, defendant's absence from the state; that plaintiff took out the first letters of administration on the estate of the intestate within one year before suit brought, and a new promise. And to the plea of infancy, necessities and a new promise. Defendant's counsel objected that the affidavit on which the motion was made, was insufficient under the 63d rule, not showing the residence of counsel who gave the advice, &c. Plaintiff's counsel replied, that the rule only applied where advice of counsel *was necessary*; that in this case it was only necessary to show by affidavit, that the matters sought to be replied *were true*, the court would judge of the necessity, &c. Defendant's counsel *on the merits*, read affidavits that the matters sought to be replied were not true.

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Conklin agt Hill

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R. GOODMAN, *plaintiff's counsel.*

WOODRUFF & GOODMAN, *plaintiff's attorneys.*

J. A. SPENCER, *defendant's counsel.*

J. S. RATHBONE, *defendant's attorney.*

JEWETT, Justice. Overruled the defendant's objection to the insufficiency of plaintiff's affidavit. And as to the [\*6] replication of a new promise \*after defendant became of full age; the judge said it could not be necessary or proper, as the intestate was shown to have died long before the defendant was of the age of twenty-one years; he however granted the motion, so far as to allow the plaintiff to reply double, *only* to the plea of the statute of limitations.

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#### ESTHER CONKLIN agt. ADDISON HILL.

Where a jury mark on ballots the amount which each juror is willing to find for the plaintiff, without the knowledge of the rest, and the several amounts thus marked, are drawn from a hat, added together, and the aggregate divided by 12, and the sum thus ascertained is rendered as their verdict; it is not irregular, where it appears the jury did it for the purpose of ascertaining how near they could come together, without making any agreement before it was done, that the averaged amount thus ascertained, should be their verdict; it being left optional with the jury to agree to such amount or not, as they pleased.

*December Term, 1845.*

MOTION by defendant to set aside verdict for irregularity.

This was an action for breach of promise of marriage, tried at the Westchester circuit, in October, 1845. The jury found a verdict for the plaintiff, of \$4,041 damages. This motion was made to set aside the verdict as irregular. The crier of the court and three of the jurors, on the part of the defendant, swore that the jury after having been out all night, without being able to agree upon the amount of their verdict, came to the conclusion in the morning, that each juror should write on a ballot the amount that he was willing to find, without the knowledge of the others, and the several ballots should be put

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Bronk agt. Conklin.

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into a hat, and drawn out, and the several amounts added together, and the aggregate sum divided by twelve, which should be their verdict; this being done, the amount ascertained was \$4,041, which was the verdict rendered by the jury in favor of the plaintiff. On the part of the plaintiff, the constable and seven jurors swore that the mode of marking upon the ballots, and adding and dividing as before mentioned, was done as one means of ascertaining how near the jury could come together, that there was no agreement before marking, that the average amount thus ascertained should be their verdict; but it was left optional with any of the jurors to agree to such sum or not, as he pleased. After the average amount was produced, the jury seemed to be satisfied with it, and rendered it as their verdict.

JOHN CURREY, *defendant's counsel and attorney.*

THOMAS NELSON, *plaintiff's counsel.*

WM. NELSON, *plaintiff's attorney.*

JEWETT, Justice. Held, that this case come within the former decisions and the verdict must be sustained. Motion denied with costs.

---

\*PHILIP BRONK agt. JOHN W. CONKLIN and HANNAH [7]  
CONKLIN

Service of a notice of retainer on plaintiff's attorney conditionally, does not entitle defendants' attorney to notice of retaxation of costs, unless the condition upon which the service was made has been complied with.

*December Term, 1845.*

MOTION by defendant Hannah Conklin, for a retaxation of plaintiffs' costs.

Declaration was served on the defendant Hannah Conklin, on the 1st day of August last: default was entered on the 23d, and record filed on the 30th of the same month. Defendants' attorney stated that he served a notice of retainer on plain-

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Mesick agt. Smith.

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tiff's attorney on the 18th of August last, and that he had never been served with notice of taxation of costs. Plaintiff's attorney stated that defendants' attorney left a notice of retainer with him conditionally, that in case a plea of said Hannah Conklin was served on him, that then defendants' attorney wished the notice of retainer left with him to be considered served, and not otherwise; the plea not having been served, the notice of retainer was considered by plaintiff's attorney not served, and he gave no notice of taxation of costs.

C. C. WASSON, *defendants' counsel and attorney.*

J. C. WRIGHT, *plaintiff's counsel.*

J. S. FROST, *plaintiff's attorney.*

JEWETT, Justice. Held, the notice of retainer not served, and denied the motion with costs.

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JOHN M. MESICK agt. JOSEPH W. SMITH *et al.*

An affidavit made for a reference must be made by the party, unless a sufficient excuse is given why it is not: where the attorney makes it, a valid excuse for its not being made by the party is always required.

*December Term, 1845.*

MOTION by defendants for a reference.

The defendants moved for a reference in this cause, upon an affidavit in the usual form made by defendants' attorney, without any excuse being given for its not being made by the defendants, or one of them.

P. W. BISHOP, *defendants' counsel and attorney.*

J. H. REYNOLDS, *plaintiff's counsel.*

WILCOXSON & VAN SCHAAK, *plaintiff's attorneys.*

The plaintiff's counsel insisted that the affidavit should have been made by the party and not the attorney, unless a sufficient excuse was given why the party did not make it.

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McSorley agt. Merrill.

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JEWETT, Justice. Sustained the objection, and decided that the affidavit was not sufficient: for that reason it did not come within the rule. Motion denied with costs, without prejudice.

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THOMAS MCSORLEY landlord, agt. JOHN H. MERRILL, [\*8]  
tenant.

This court has not jurisdiction of the taxation of costs, in a matter of proceedings before an assistant justice of New-York city, under the statute authorizing summary proceedings in case of non-payment of rent, &c.

*December Term, 1845.*

APPEAL from taxation of costs.

It appeared that McSorley undertook to dispossess Merrill, his tenant, under the statute authorizing summary proceedings in case non-payment of rent, &c. The first two efforts were ineffectual, by reason of some irregularity in the process. The third proved to be successful. The proceedings were had before one of the assistant justices of New-York city. The defendant (the tenant) taxed costs against the landlord on those unsuccessful attempts, before EDMONDS, circuit judge, under the fee bill of 1840; the first bill being taxed at over \$50, the second at over \$23. From this taxation the landlord appealed to this court.

R. GOODMAN, *counsel for landlord.*

B. F. SHERMAN, *attorney for landlord.*

N. HILL, JR., *defendant's counsel.*

B. H. SHANNON, *defendant's attorney.*

JEWETT, Justice. Held, that this court had not jurisdiction of the matter, and denied the motion with costs.

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Kingston Bank agt. Roosa.

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## THE KINGSTON BANK agt. SOLOMON ROOSA.

An attorney who had retired from practice on account of ill health, and removed some twenty miles distant from his office, verbally requested another attorney to take charge of his books and papers remaining in his office, and settle up what was unsettled; and the attorney, thus authorized, received costs in a suit, and a stipulation to try for him (which was one of the suits unsettled). *Held*, that the authority was sufficient, notwithstanding on a motion afterwards the attorney first mentioned and his client both swore that they never gave any authority to receive the costs and stipulation in the cause.

*December Term, 1845.*

MOTION to set aside judgment for costs against plaintiffs.

Defendant moved for judgment as in case of nonsuit, at the last September special term; which was granted, unless plaintiffs stipulated to try at the next circuit, and paid costs of motion. Within twenty days the plaintiffs paid costs and stipulated to try, by paying the costs to M. Schoonmaker, Esq., an attorney of this court, residing at Kingston, and serving on him a stipulation. Philip E. Pitcher, Esq., of Redhook, the former attorney of defendant, and who formerly resided at Kingston, left the papers in this and other suits with his late partner Nicholas Sickles, Esq., who died in May last. Mr. Schoonmaker, in the early part of last summer, being about to administer upon the estate of N. Sickles, deceased, called upon [\*9] \*Mr. Pitcher (who had retired from the practice of law, on account of continued illness, who requested Schoonmaker to take charge of his books and papers remaining in the office of Sickles & Pitcher, and settle up what was remaining unsettled (the papers in this suit being among the rest), which was accordingly done by Schoonmaker. In the latter part of June, and after the interview with Pitcher, the defendant called on Schoonmaker, and requested him to make out papers for motion for judgment as in case of nonsuit, which was done by Schoonmaker, in the name of Pitcher. At the time plaintiffs' attorney called to pay costs and serve stipulation, Schoon-

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Kingston Bank agt. Roosa.

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maker told him he had authority to act for Pitcher as his agent, and that as such he would receive the costs and stipulation, and accordingly did so, and gave a receipt for the costs in the name of Pitcher; all of which was communicated to the defendant Roosa, within a few days thereafter. Subsequently the defendant Roosa requested Schoonmaker to procure from Pitcher an agreement to have another attorney substituted for defendant, which was done, and Egbert Whitaker, Esq., of Saugerties, was substituted in the place of Pitcher, on or about the 28th of October last. The defendant's present attorney entered up judgment for costs against plaintiffs, on the 1st November last. It was sworn to by the defendant Roosa, and Pitcher, his former attorney, that they had not received any costs of motion or stipulation to try from plaintiffs, nor had they authorized any other person to receive the same for them. Whitaker, the present attorney, stated that he knew nothing about the cause, until on or about the 24th of October last, when it was intended to substitute him as the attorney for the defendant, and when he learned that the costs had not been paid to defendant or Pitcher, afterwards he heard plaintiffs had pretended to pay the costs to Schoonmaker, whose authority to receive them was denied by the defendant and Pitcher.

J. C. FORSYTH, *plaintiffs' counsel.*

H. M. ROMEYN, *plaintiffs' attorney.*

E. SANFORD, *defendant's counsel.*

E. WHITAKER, *defendant's attorney.*

JEWETT, Justice. Thought the authority of Schoonmaker should be considered sufficient to receive the costs and stipulation as the agent of Pitcher. Schoonmaker undoubtedly thought he had authority, and acted in good faith, and there was something due to the honor of the profession in such cases.

Motion granted without costs, plaintiffs' attorney to stipulate and pay costs of last motion in twenty days.

Another cause between the same parties, upon the same state of facts, decided the same.

[\*10] \*STEPHEN BOYLE agt. PATRICK BOYLE.

It is not necessary to be stated, in an affidavit on a motion, the *name of the judge* of the circuit, at which a cause is referred.

The new rule 44, after it took effect on the 1st of August last, must govern in the matter of practice, on motion for judgment as in case of non-suit, for not noticing cause for hearing, although the cause was referred previous to the 1st of August last. After the new rules took effect, there was no other for the court.

*December Term, 1845.*

MOTION by defendant for judgment as in case of nonsuit.

This cause was referred at a circuit in May last, to a sole referee, on motion of plaintiff. In September last, the plaintiff not having noticed it for hearing, the defendant's attorney served plaintiff's attorney with a notice in writing, that plaintiff notice the cause for a hearing in forty days, or that defendant would move for judgment as in case of nonsuit, according to the 44th (new) rule.

G. W. CUMMING, *defendant's counsel and attorney.*

S. W. JACKSON, *plaintiff's counsel and attorney.*

Plaintiff's counsel objected, 1st, that the affidavit did not show it was referred, as it did not name the circuit judge, by whom it was referred. 2d, that the new rules did not take effect until the first day of August last, and consequently could have no application to causes referred, before the rule (44) went into operation.

JEWETT, Justice. Held, the reference regular; and that the new rules must now govern, for as soon as they went into effect, there were no other rules for the court.

Motion granted with costs.



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Cary agt. Willson.

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## JEREMIAH E. CARY agt. JABEZ S. WILLSON.

Costs \$10 of preparing papers for a motion for reference, will not be allowed, in the general bill where it is stipulated by the attorneys on each side previous to the motion, to refer the cause, and nothing is said about the costs: the papers having been actually prepared.

A counsel fee \$3, for attending prepared to try, &c., under the act of 1844, will not be allowed, to the party who moves an adjournment of the hearing. The attorney fee is taxable under such circumstances.

*December Term, 1845.*

MOTION by defendant for retaxation of plaintiff's costs.

This was an action of assumpsit for professional services; the cause was tried before a sole referee. It appeared that the plaintiff made out and served papers on defendant's attorney, for a motion to refer. Subsequently, in consideration that defendant's attorney might plead the statute of limitations, he stipulated with plaintiff to refer to a sole referee, and the motion was \*not made. The plaintiff was an at- [\*11] torney and counsellor of this court; the suit was prosecuted in the name of his partner (Mott) as attorney. The cause was once adjourned on motion of defendant. Defendant's attorney objected to the following items in the bill, which were allowed by the taxing officer. Copy narr to return with proof of service, \$1.25; preparing papers to move for reference, costs of motion; \$10; notice of hearing for referee, \$25; attorney's fee attending reference on first hearing, \$3; counsel fee attending prepared to try pursuant to notice, \$3; one copy *sub. duces tecum*, 25; one copy *sub.* 25; two copies *sub. duces tecum*, 50; furnishing proof of service of copy order of particulars, 50; objected to, 37½; proof of service of bill of particulars, 50; objected to, 37½; serving *sub.* on six witnesses for second hearing, 75; objected to, 37½; entering return of execution, 12½; proof of referee's fees as per bill, 50; oath, 12½.

C. D. COLEMAN, *defendant's counsel and attorney.*

J. E. CARY, *plaintiff's counsel.*

R. MOTT, *plaintiff's attorney.*

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Sacket's Harbor Bank agt. Martin.

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JEWETT, Justice. There must be a retaxation of the costs in this suit. The following items taxed are not taxable, and should be stricken out, viz.: preparing papers for motion for reference, \$10; notice of hearing, for referee, 25; serving bill of particulars, &c., 75; and all writs of subpoena charged beyond one, and one writ of *sub. duces tecum* for each hearing, if actually made out and served; and all copies or tickets, except such as were necessary and actually used. The attorney and counsel fee attending prepared for hearing were taxable, the hearing having been postponed by the defendant. The act of 1844, page 273, § 2, expressly allows a fee of \$3 to counsel for attending prepared for such trial, &c. If the adjournment had been at the request of the plaintiff, he would not have been entitled to those items. (3 *Wend.* 305; 6 *Cow.* 42.) It is well settled that the attorney fee is taxable under such circumstances. (4 *Hill*, 54.)

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THE SACKET'S HARBOR BANK agt. JOHN W. MARTIN.

Where a cause was referred, and the parties before the reference entered into a stipulation directing certain terms and conditions in relation to it; and the defendant, to secure the fulfillment on his part, gave a cognovit for the full amount of plaintiffs' claim against him, on which cognovit no judgment was to be entered by plaintiffs, and was to be void if the conditions in the stipulation on the part of the defendant were performed as stipulated; and the referee reported in favor of the plaintiffs, which report defendant prepared to move to set aside, and procured an order from the circuit judge, staying

[\*12] ing \*proceedings in the cause until decision on the motion to set aside the report should be had; and after the order to stay was served on plaintiff's attorney, and before the decision of the motion, he entered judgment against the defendant on the *cognovit* for non-compliance with the terms of the stipulation: *Held*, that the judgment was entered in violation of the order to stay proceedings made by the circuit judge. It was a proceeding in that suit.

*December Term, 1845.*

MOTION by defendant to set aside judgment for irregularity. The plaintiffs commenced a suit against the defendant and

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Sacket's Harbor Bank agt. Martin.

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Thomas Baker, and also another suit against the defendant, Thomas Baker, and Charles L. Martin, both at the same time in the year 1843, on five drafts made and used for the accommodation of the defendant John W. Martin. In June, 1844, by stipulation, the suits were referred to Hon. P. Gridley as sole referee. The defence set up by defendant was usury. The parties, pursuant to a notice of hearing, met before the referee, on the 22d January last, and agreed that the testimony taken by the referee should be deemed to be taken in both causes, the defence being the same in each. On the same day an agreement and stipulation was entered into and executed by and between Jesse C. Dann, cashier of the plaintiffs (who had the management of the causes on the part of plaintiffs) and the defendant John W. Martin, whereby the defendant, John W. Martin, gave to the plaintiffs a cognovit for \$14,766, being the amount of principal and interest of the drafts on which the suits were brought. It was then stipulated that no judgment should be entered on the cognovit, if John W. Martin should, within thirty days, give to the plaintiffs his note for the sum of \$10,172.36, payable in three, four and five years from that date, with interest, &c., and should also give to the plaintiffs collateral security for \$2,386.75, of said sum, by satisfactory indorsed paper, to be approved by the cashier of the Lowville Bank, and in the event of said John W. Martin thus giving said note and said security, said cognovit should be given up and cancelled. The stipulation further gave the amount of liability for which each defendant in the suits should be responsible; and stated the amount of costs which the defeated party should pay on the final event of the suits on the reference, and the time and manner of such payment, and also that the stipulation should be void, as regarded the plaintiffs, unless the firm of one Gilchrist & Co., and also the Lewis County Bank, should, within sixty days from that date, give the plaintiffs a writing, assenting to the stipulation, and that their liability to the plaintiffs on the drafts should not be affected thereby, and unless such assent was given, the plaintiffs might proceed and enter judgment on the cognovit.

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Sacket's Harbor Bank agt. Martin.

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The defendant, John W. Martin, did not procure the [13] securities nor the assent \*required by the stipulation within the time mentioned in the stipulation, but stated that there was an understanding between the parties at the time the cognovit was signed, that the object principally was to secure the delivery of the securities and assent as mentioned in the stipulation, before the hearings should be closed. Martin, some twelve days before the day noticed for hearing in the causes, called to see C. P. Kirkland, Esq., at Utica, who was counsel to try the causes for the plaintiffs, to get a waiver of the time mentioned in the stipulation for giving the securities and assent. Kirkland being absent, he called on Mr. Bacon, of Utica, the law partner of Kirkland, for the same purpose, and told him he was on his way to Boston to subpoena witnesses for the hearing, and as there was about a week before the time would expire, mentioned in the stipulation, he wished to know whether he should be required to return and procure the securities or not, as he desired to fulfil the stipulation; Bacon told him to go on, there would be no risk about it, and no advantage taken of the lapse of time as regarded giving the notes and security. Afterwards he saw Kirkland, who informed him that it should be sufficient if they were furnished at any time before the hearings were closed. On the day before the hearings were closed, Martin by his counsel presented the notes and securities and written assent mentioned in the stipulation to Dann, the cashier of plaintiffs, who soon after returned them, stating as an objection to receiving them, that the time having passed, it might be necessary to get the action of board of directors of plaintiffs; the same day and during the hearing, the defendant's counsel presented them to Kirkland, plaintiffs' counsel, who made the same objection as Dann, but, however, took them; the hearings in both causes closed on the 4th day of April last.

On the part of the plaintiffs in answer to defendant Martin, it was stated by Kirkland that he expressly told Martin, when inquired of respecting extending the time mentioned in the stipulation for giving securities, &c., that he, Kirkland, had no

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Sacket's Harbor Bank agt. Martin.

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authority in that matter; he merely acted as counsel in trying the causes, but expressed his belief to Martin, that the mere non-delivery of the notes within thirty days would not be insisted on as an objection, and that in his opinion it ought not to be, if Martin complied in other respects with the stipulation, but that was a matter he had better see the plaintiffs or his attorney about. Bacon also stated that he told Martin that he had no authority to give him any stipulation or opinion in the matter that would be binding in relation to extending time; that he had nothing to do in the matter; his partner was merely counsel \*to try the causes; [\*14] Kirkland stated that when he took the papers for security from Bennett, defendant's attorney, he told Bennett he had no authority whatever to receive them or to act in any way on that subject, but he would take the papers and look at them, which he did, and in three or four days returned them by mail to Martin. Plaintiffs' papers contained a denial that any waiver of time in the stipulation was given, or that the papers might be delivered at any time before the close of the hearings, and also that the papers were not in compliance with the stipulation. On the 7th of April, 1845, the referee reported in the causes for the plaintiffs, the full amount of their claim; the defendant prepared to move to set aside the reports, and on the 4th of June, 1845, procured an order in each cause from Judge GRIDLEY, circuit judge, staying all proceedings until the motion to set aside the reports should be decided. The orders were served on plaintiffs' attorney on the 17th of June, 1845. On the 1st of August, 1845, the plaintiffs entered judgment on the cognovit given by Martin. The suit having been originally commenced against Thomas Baker and John W. Martin, upon four of the drafts before mentioned, and to which the defendants pleaded, the suit was severed and judgment taken against Martin alone on his cognovit given with his stipulation mentioned.

It was insisted by defendant, that the plaintiffs had waived the time mentioned in the stipulation, and that the stipulation had been performed by defendant within the meaning of it by

the parties. Also that the judgment was entered in violation of the order of Judge GRIDLEY, staying proceedings, the decision upon the motion to set aside the reports of the referee not having been made.

It was insisted by plaintiffs that the defendant had failed to perform the stipulation according to its terms, and that there had been no waiver of any of its conditions, by them; and that it was their duty to enter the judgment for the protection of the rights of the indorsers and guarantees responsible to plaintiffs for the demand; that the order of the circuit judge did not affect this suit.

E. SANDFORD, *defendant's counsel.*

D. M. BENNETT, *defendant's attorney.*

A. TABER, *plaintiffs' counsel.*

GEO. C. SHERMAN, *plaintiffs' attorney.*

JEWETT, Justice. This motion is granted with costs, on the sole ground that the entry of the judgment was in violation of the order to stay proceedings made by the circuit judge; it was a proceeding in that suit.

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[\*15] \*SARAH M. WEEKS agt. HENRY P. WANMAKER, public Administrator of Michael Fogarth, deceased.

A judgment for costs cannot be regularly entered against an administrator, or the public administrator of the city of New-York, without first making application to this court, for an order for costs.

*December Term, 1845.*

MOTION by defendant to set aside judgment for irregularity.

This was an appeal from the decision of the circuit judge of the first circuit. The suit was commenced in the New-York common pleas, and removed to this court by certiorari; referred to referees, who made a report, which report was set aside by a rule of this court, dated February 13, 1845, costs

to abide the event. The referees on a rehearing made another report in favor of the plaintiff on the 19th of July last, for \$2,100. On the 22d July, defendant's attorney obtained an order staying proceedings, twenty days, for defendant to prepare to move to set aside the report of the referees; the order was granted by D. P. INGRAHAM, associate judge of the New-York common pleas, in the absence of the circuit judge; on the same day served on plaintiff's attorney a copy of the order and affidavit upon which it was granted. On the 21st of July, plaintiff's attorney filed the report of the referees and entered rule for judgment thereon; and on the 2d of August following filed and entered up judgment for \$2,100 damages, and \$459.53 costs, against the defendant as administrator. It was insisted by defendant's counsel that the judgment was irregularly entered, for the reason that it was in violation of the order to stay, and also that the plaintiff had never procured any certificate from the referees by which she would be entitled to make application to this court for costs against the defendant as administrator, pursuant to the statutes, and that no such application had ever been made.

On the part of plaintiff it was insisted: first, that the order of the judge of the common pleas was a mere nullity, and second, that this court and the parties also by consent had made the costs abide the event, so that no special application was necessary, but that if a special application was necessary, the matter was properly before the circuit judge. (6 Hill, 389.) And he denied the motion to set aside the judgment upon the grounds mentioned.

M. T. REYNOLDS, *defendant's counsel.*

JOHN B. HASKIN, *defendant's attorney.*

E. C. GRAY, *plaintiff's counsel and attorney.*

JEWETT, Justice. The motion to set aside the judgment on the ground of irregularity is granted. The irregularity consists in entering judgment for costs against an administrator, without having applied to this court \*and ob- [\*16]tained an order for costs. The question of costs in the

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Bascom agt. Feazler.

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cause is not considered on this motion, it is not within the case in 6 *Hill*, 386. The defendant does not consent that that question should be considered.

*Decision.*—Judgment set aside with \$10 costs, and further that defendant have fifteen days to prepare to move to set aside the report of referees, and that all proceedings be stayed until the case is settled.

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ANSEL BASCOM agt. ABEL FEAZLER.

A judgment will not be set aside as irregular by reason of any default or negligence of any clerk in entering rules, by which neither party shall have been prejudiced.

A motion having been once decided on the merits, without leave to renew, the decision will be held conclusive where the facts are *essentially the same*, on the second application.

*December Term, 1845.*

MOTION by defendant to set aside a judgment for irregularity.

This suit was commenced by *capias*, for trespass in cutting down timber, &c., on plaintiff's premises; the writ was returnable at May term, 1844. Defendant gave bail to the sheriff, and a declaration *de bene esse* was filed on the 23d May, 1844. Plaintiff's attorney in October term afterwards wrote to the clerk at Geneva, to enter the proper rules for a writ of inquiry; the writ of inquiry was not executed until January, 1845. The day before the writ was executed, plaintiff's attorney wrote again to the clerk, as follows (after giving the title, &c.) "I am not certain that defendant's appearance has been entered: enter defendant's appearance, default for want of a plea, rule for interlocutory judgment and that a writ of inquiry issue. Let it be done to-morrow, Friday, January 17, 1845." To which the deputy clerk wrote in return. "This rule was entered October 21, 1844, which answers all



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Bascom agt. Feazler.

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purposes, I should think." On the 18th January, 1845, the writ of inquiry was executed.

The defendant's attorney, about the first of June last, personally examined the common rule books and files of the clerk, at Geneva, and found that no common bail had been filed for defendant by the plaintiff, and that neither the appearance nor default of the defendant had been entered, and that no paper had been filed or rule entered between the 23d May, 1844, and the 22d Oct., 1844, when a rule, that a writ of inquiry of damages issue, was entered, and procured the clerk's certificate of those facts. The defendant made a motion to set aside the judgment and proceedings in this cause, at the last April special term, which was denied on the merits without any leave given to renew; he had not at that \*time found out the [\*17] omission of the entry of the rules by plaintiff's attorney, and at this term renewed the motion on the merits essentially on the same facts, as well as to set aside for irregularity. The defendant claimed on the merits, that he owned the premises, for which he had been prosecuted by plaintiff, for committing trespass upon, and had been deceived by plaintiff in relation to the title, &c. The papers on both sides contained the whole history and merits of the case.

MR. FOOTE, *defendant's counsel.*

WM. S. STOW, *defendant's attorney.*

N. HILL, JR., *plaintiff's counsel.*

S. D. TILLMAN, *plaintiff's attorney.*

JEWETT, Justice. I must regard the denial of the motion made in this cause at the last April term as decisive of this motion, so far as the merits are concerned (*Dollfus and others agt. Frosch*, 5 *Hill*, 493, 4, *note A.*)

As it respects the irregularity complained of, it is shown by the affidavit of the plaintiff that on the 17th day of January, 1845, prior to the time when the writ of inquiry was executed, he wrote to the clerk of this court at Geneva, that he was not certain that the appearance of the defendant had been entered; and directed him to enter the defendant's appearance,

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 Dyckman agt. Allen.
 

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default for want of a plea, rule for interlocutory judgment, and that a writ of inquiry issue as early as the next day. The clerk answered this letter, that "this rule was entered October 21, 1844." If it was not done, it was clearly the negligence or omission of the clerk, and neither party has been prejudiced by the omission, the judgment must be held to be regular. (2 R. S. 424, 5, § 7, *sub.* 13, 14.)

Motion denied, with \$7 costs.

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REBECCA DYCKMAN *et al.* agt. STEPHEN ALLEN *et al.*

Where, in an action for trespass on lands by several plaintiffs, and during the pendency of the suit, one of the plaintiffs dies, the suit abates: it does not survive to the co-plaintiffs.

*December Term, 1845.*

MOTION by defendants for judgment as in case of nonsuit.

The defendants moved on a stipulation given by plaintiff 23d May, 1845, to try, and an affidavit showing that subsequent thereto a circuit was held at which the cause was not noticed for trial by plaintiffs, &c. The plaintiffs showed that this was an action for trespass on lands claimed by plaintiffs; that Cathalina B. Dyckman, one of the plaintiffs, died on the 22d February, 1845, and that no suggestion of her death had been made.

WARD & LOCKWOOD, *defendants' attorneys.*

W. N. DYCKMAN, *plaintiffs' attorney.*

JEWETT, Justice. Motion denied without costs to [\*18] either party, on the \*ground that the suit abated by the death of C. B. Dyckman on the 22d February, 1845; it being an action of trespass on lands, the cause of action did not survive to her co-plaintiffs. (2 R. S. 386, § 1.)

Another cause between the same plaintiffs and Amos Bixby, for a like motion, was decided the same.

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 Bates agt. Wotkyns.
 

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### CALVIN BATES agt. ALFRED WOTKYNs.

A plaintiff, in giving a bill of particulars under a second order, stated it as follows: To the following sums of money received by the said defendant for the said plaintiff, to whom they belong, viz., \$200, \$100, \$100, \$114, \$200, \$330, \$50; all of which were so received at various times during the years 1840, 1841, 1842, 1843 and 1844, but in what particular months, or upon what particular days of such months, the said plaintiff is unable to state, as he kept no account of the dates, nor is he able to ascertain the same; but he believes the said defendant well knows the dates at which said sums were respectively received, as he left said defendant to keep the account thereof, being himself unable to read or write: *Held*, that the bill of particulars was insufficient, for want of particularity and precision.

*December Term, 1845.*

MOTION by defendant for judgment of non pros.

This was an action of assumpsit: the declaration contained the common money counts, and a count on an account stated. On the 13th October, 1845, defendant's attorney obtained an order for plaintiff's bill of particulars, which was served as follows: "Alfred Wotkyns to Calvin Bates, Dr.: To moneys received by the said Wotkyns, for and belonging to the said Bates, at different times during the years 1840, 1841, 1842, 1843 and 1844, and in various sums, viz., \$200, \$100, \$100, \$114, \$200, \$330, \$50, and other sums during said years, in all amounting to . . . . . \$1,400.00  
January 13, 1844. To money received by said

Wotkyns, for and belonging to said Bates . 499.15." On the 17th of October, defendant's attorney procured a second order, requiring plaintiff to specify therein the particular sum received by the defendant for the plaintiff, the time when each sum was so received, as near as might be, and the purpose for which they were so received. Plaintiff's attorney served a second bill as follows:

"Alfred Wotkyns to Calvin Bates, Dr. To the following sums of money received by the said Wotkyns for the said Bates, which were intrusted to said Wotkyns to be accounted for by him to said Bates, to whom they belong, viz., \$200,

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Bates agt. Wotkyns.

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\$100, \$100, \$114, \$200, \$330, \$50, all of which were so received at various times during the years 1840, 1841, 1842, 1843, 1844, but in what particular months, or upon [\*19] what \*particular days of such months, the said Bates is unable to state, as he kept no account of the dates, nor is he able to ascertain the same; but he believes that the said Wotkyns well knows the dates at which said sums were respectively received, as he left said Wotkyns to keep the account thereof, being himself unable to read or write. Also to other sums so received, and for the purpose aforesaid during said years, but the particular amount thereof, and the times when received, the said Bates is unable, for the reasons aforesaid, to state, but he believes the amounts and dates are well known to the said Wotkyns, for the aforesaid reasons. To moneys so received by said Wotkyns, for and belonging to said Bates, and so intrusted at various times, from the early part of the year 1834, to about the month of July, 1843, so that the balance thereof in said Wotkyns's hands amounted to, and was acknowledged by said Wotkyns to be, at the said last named time, \$1,400 or thereabouts; but the particular sums or dates, the said Bates is unable to state, for the reasons aforesaid.

Jan. 18, 1844. To moneys received by said Wotkyns for and belonging to said Bates, for which the said Wotkyns was to account to said Bates,  
\$499.15

To interest in said sums."

The defendant swore that he gave the account as near as he could, and meant in good faith to comply with the orders.

J. PIERSON, *defendant's counsel and attorney.*

J. EDWARDS, *plaintiff's counsel.*

S. H. TERRY, *plaintiff's attorney.*

JEWETT, Justice. The bill of particulars, delivered under the order of the 17th day of October, is no better than the first, and is not a compliance with the order. The facts shown by the affidavits of the plaintiff and his attorney, however, induce

Spencer agt. The President, &c., of the Canal Bank of Albany.

me to think that there was a bona fide intention to comply with the order. I therefore allow the plaintiff time to deliver further and better particulars of his demand till the 20th day of January next, on payment of the costs of this motion in ten days.

Rule accordingly

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SUSANNAH SPENCER agt. THE PRESIDENT, &c., OF THE  
CANAL BANK OF ALBANY.

Where a motion was made for the payment over, by plaintiff or her attorneys, of certain moneys, and separate copies of the papers for the motion were served on the plaintiff and her attorneys, and the motion was denied with costs to be taxed. *Held*, that the plaintiff and her attorneys were not entitled to two bills of costs for opposing, although they made out separate papers in opposition.

*December Term, 1845.*

MOTION by Richard S. Corning to set aside a precept.

In February, 1844, \*a motion was made, entitled in [\*20] this cause on the part of Richard S. Corning, at the February special term, 1844, for an order requiring the plaintiff or her attorneys to pay over certain moneys, &c., which motion was denied with costs to be taxed. Copies of the papers for that motion were served on the plaintiff, and on Cagger and Stevens, her attorneys; separate and distinct papers were made and used in opposition to the motion. Separate bills of costs were made out, copies served with notice of taxation, both bills on the taxation were opposed on the part of Corning. After the taxation of both bills, the amount at which the first was taxed was paid by the agent of Corning, the second bill was objected to as improper, on the ground that but one motion had been made. The taxation took place in February or March, 1844. Subsequently the second bill of costs was demanded of Corning, and payment refused, and thereupon an ex parte motion was made by Cagger and Stevens for a precept, which was granted with costs to be taxed, at the

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Kidd agt. Brown.

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June special term last; which precept was delivered to the sheriff for execution, and Corning was arrested in September last.

A. C. GRISWOLD, *counsel and attorney for Corning.*

P. CAGGER, *counsel and attorney for plaintiff.*

On the part of the plaintiff, it was insisted that the plaintiff was entitled to two bills of costs for opposing the motion; also that this motion was too late.

JEWETT, Justice. Under the rule of the 9th of February, 1844, only one bill of costs was ordered for opposing. The taxation of the second bill was a *nullity*, and Corning, in whose behalf the motion was made, was liable to pay costs, and having paid the bill as taxed, lost nothing by waiting until proceedings were taken to enforce payment of the second bill. (*Graham's Practice*, 2 ed. 705.)

Motion granted with \$10 costs, upon condition that Richard S. Corning stipulates that he will not bring any action for his arrest by virtue of the said precept.

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JAMES KIDD agt. HENRY E. BROWN, Impleaded with RALPH JOHNSON.

A judgment entered against two defendants as co-partners on a cognovit signed by one of them, for the firm, after service of a declaration on the defendant, giving the cognovit, is regular against the defendants as joint debtors. (10 *Wend.* 630.)

*December Term, 1845.*

MOTION for defendant Brown to set aside judgment for irregularity.

This was a judgment entered upon a cognovit given by defendant Johnson for the firm of Johnson & Brown, [\*21] who were co-partners. After \*the service of a declaration on Johnson. Brown not having been served with declaration. Brown alleged he did not consent to it;

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Groesbeck agt. Brown.

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judgment was entered against both defendants and execution issued against the joint property of the defendants and the sole property of defendant Johnson.

R. W. PECKHAM, *counsel for Brown.*

PECKHAMS & COLT, *attorneys for Brown.*

F. O. SHEPARD, *plaintiff's counsel.*

HARRIS & SHEPARD, *plaintiff's attorneys.*

JEWETT, Justice. The judgment is regular against the defendants as joint debtors. (10 *Wend.* 630.) The motion must be denied, with costs.

Rule accordingly.

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JOHN GROESBECK *et al.* agt. HENRY E. BROWN and RALPH JOHNSON.

Where a declaration against two defendants, co-partners, is served on one of the co-partners, and he employs an attorney to appear for both defendants composing the co-partnership, and the attorney thus employed gives a cognovit for both defendants, and a judgment is thereupon entered, the defendant not served with declaration denying that the attorney giving the cognovit had any authority from him to give the cognovit in any wise—the judgment will be set aside as to the defendant not served with declaration; although it appear that a copy of the declaration was served on him on the same day judgment was entered, but two or three hours afterwards.

*December Term, 1845.*

MOTION by defendant Brown to set aside judgment for irregularity.

The defendants in this cause were co-partners, and as such were indebted to plaintiffs. On the 22d September last, plaintiffs' attorneys served on defendant Johnson a declaration. Johnson employed one Whipple, an attorney, to appear for both defendants, and directed him to give a cognovit in the cause for the amount of the indebtedness. On the same day, at 12 o'clock at noon, judgment was entered up and filed against both defendants on a cognovit given by Whipple, the

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Mitchell agt. Matthews.

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attorney employed by Johnson. On the said 22d September, after three o'clock in the afternoon, a declaration was served by plaintiff's attorneys on defendant Brown. Brown alleged that he never gave Whipple, the attorney who gave the cognovit, any authority to appear for him, in this suit, as attorney or otherwise; but had refused, on the said 22d of September, to confess a judgment to plaintiffs in this cause, and had employed attorneys to defend the suit on the merits. It was alleged in the moving papers that Whipple the attorney was irresponsible. Execution was issued on the judgment.

R. W. PECKHAM, *counsel for Brown.*

PECKHAMS & COLT, *attorneys for Brown.*

E. A. DOOLITTLE, *plaintiff's counsel.*

WHEATON & Co., *plaintiff's attorneys.*

JEWETT, Justice. The judgment against Brown must be set aside. Whipple had no authority to confess a [\*22] judgment as his attorney. Brown \*has a defence on the merits, and the attorney is not responsible. It would have been competent for Johnson to have confessed a judgment under the joint debtor act, so as to bind partnership property, the declaration being served on him, (10 *Wend.* 630,) but that is not this case; here the judgment is against both defendants as upon a service of process upon both. Besides, there is good ground to believe that this judgment was the result of collusion between the plaintiff's attorneys, Johnson and Whipple.

Motion granted that the judgment and execution as against the defendant Brown be set aside, with \$10 costs.

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WILLIAM M. MITCHELL, administrator, &c. agt. EDWARD C. MATTHEWS.

In action of trover brought by the public administrator of New-York, on information and belief, for an alleged conversion by defendant, in the lifetime of the intestate and also after his death, of certain goods and chattels of the intestate,



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John A. Matthews.

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the prosecution of the cause having been abandoned by plaintiff in consequence of supposed insolvency of defendant, and judgment as in case of nonsuit having been granted in favor of the defendant, it was *held*, that the suit was not necessarily prosecuted in the right of the intestate, and that the plaintiff was personally liable for costs, if there was no property of the intestate.

*December Term, 1845.*

MOTION by defendant for leave to enter up judgment for his costs against the plaintiff, to be levied of the assets of the plaintiff's intestate, if any, and if not of the plaintiff's own property.

This was action of trover commenced by capias for an alleged conversion by the defendant in the lifetime of the intestate, and also after his death, of certain goods and chattels. Defendant being non-resident was held to bail. On motion to discharge defendant on common bail, it was shown that plaintiff commenced the suit on information and belief of the facts constituting the cause of action. The defendant was on that ground discharged on common bail. The plaintiff then proposed to defendant's attorney to discontinue the suit, each party to pay his own costs, which proposition was refused, defendant's attorney claiming he was entitled to costs. Plaintiff's attorney in answer alleged that an administrator was not liable for costs, in a suit brought in his official capacity. Plaintiff's attorney stated that the estate was insolvent, and there was no means of paying costs or expenses from said estate. The defendant swore that he was not insolvent, but, on the contrary, was possessed of considerable property over and above his debts. At February special term last, a motion was made by defendant for judgment as in case of nonsuit, which was granted.

BELL & COE, *plaintiff's counsel.*

W. S. SEARS, *defendant's attorney.*

\*JEWETT, Justice. The affidavits show clearly that [\*28] the suit was not necessarily prosecuted in the right of the intestate, and besides there is some evidence that the suit was brought and conducted in bad faith. (2 R. S. 615, § 17; 9 Wend. 486.) Motion granted with costs.

## ALONZO H. TAYLOR agt. LEONARD K. EVERETT.

A verdict of a jury will not be set aside for improper conduct of the constable, such as giving intelligence to one of the jurors in writing, that a boy had been ground up in his mill, whereby the juror and some of his fellows became excited and alarmed; if it appear separate from the affidavits of the jurors, that it did not materially disturb their deliberations and influence their verdict.

Declarations and admissions of jurors made subsequent to the rendition of their verdict are not admissible in support of a motion to set aside. (5 *Hill*, 560.)

The affidavit of a juror cannot be received to impeach the verdict for mistake or error in respect to the merits, nor to prove irregularity or misconduct either on his own part or that of his fellows.

*December Term, 1845.*

MOTION by defendant to set aside verdict for irregularity.

This was an action of assault and battery, tried at Putnam circuit in November last; the jury, after having been out about five hours, rendered a verdict for the plaintiff of \$50. Samuel Myrick, who was foreman of the jury, swore that soon after the jury retired they were divided, ranging from \$10 to \$150 for plaintiff; his own private opinion was \$25, although he had marked \$45 in order to ascertain how the others stood. He never intended to give a verdict for plaintiff of \$50, and should not have done so, had not Jesse Baker, the constable having charge of the jury, communicated to him in writing certain intelligence, by writing the same on a piece of paper in presence of the jury, which was in the words following, viz.: "Charles Everitt's boy has got ground up in your mill;" he, being part owner of a mill, and his family residing but a few rods from it, was apprehensive that the accident would greatly excite and alarm his family, and would seriously afflict his wife who was in feeble health; and the constable, shortly after the intelligence, made signs by drawing his hands across his legs in two different places and once across his body, in presence of the jury, which led him to believe the boy had been mangled to pieces in the mill, and in consequence of his alarm and excitement from such intelligence, he was induced to agree to a verdict of \$50 in order that he might return

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Taylor agt. Everett.

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home as soon as he could. On arriving at his residence, he found the boy but slightly injured in comparison to the intelligence he had received. Two other jurors swore to the same intelligence \*received from the constable, and [\*24] that they, in consequence of the sympathy they felt for Myrick, were induced to agree to a larger verdict than they thought proper. It was alleged from facts related in defendant's papers, that there was some collusion between the constable, Baker, and the brother of plaintiff, and the plaintiff himself and others; that the constable had exaggerated the statement of the accident to the jury, in order to disturb their deliberations and induce them to agree hastily to a verdict for the plaintiff, of at least \$50, there being at the time not much prospect of their being able to agree soon.

On the part of the plaintiff, Baker, the constable, swore, that he intended nothing improper in giving the intelligence to Myrick; he related it as he received it, supposing the boy's legs were broken twice, whereas it appeared they were broke only once. The plaintiff's papers denied fully all collusion on the part of Baker, alleged in defendant's papers, and seven of the jurors swore that the intelligence in their opinion did not materially disturb the deliberations of the jury; they were out an hour or more after the intelligence was communicated to Myrick, and a large proportion of them were for a verdict of \$50 and over.

B. BAILEY, *defendant's counsel and attorney.*

E. YERKS, *plaintiff's counsel and attorney.*

JEWETT, Justice. The affidavit of a juror cannot be received to impeach the verdict for mistake or error in respect to the merits, nor to prove irregularity or misconduct either on his own part or that of his fellows; nor are the declarations or admissions of jurors made subsequent to the rendition of their verdict admissible in support of a motion to set aside. (*Clum agt. Smith*, 5 *Hill*, 560.) Rejecting the affidavits of the jurors and disregarding what other affidavits prove their declarations, there is no evidence that the intelligence commu-

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Van Rensselaer agt. Palmatier.

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nicated by the constable influenced the verdict in any respect, and although the conduct of the constable is deserving of severe animadversion, yet the verdict cannot be set aside on that ground.

Motion denied with costs.

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STEPHEN VAN RENSSELAER *et al.* executors, &c. agt. ALBERT PALMATIER.

A declaration must be served personally; no service short of that is good. Where it was shown that in the manor of Rensselaerwyck it was almost impossible to get personal service upon a defendant at the suit of Stephen Van Rensselaer, and facts were stated showing that a defendant kept out of the way to avoid service of declaration at the suit of Stephen Van Rensselaer's ex-  
 [\*25] ecutors, and that the circumstances \*went strongly to show that the defendant had seen the declaration intended to have been served upon him, it having been left with a man in defendant's employ with directions to serve it on defendant, and the deputy sheriff had told defendant he had such a declaration to serve on him: it was *held* that nothing but personal service was sufficient.

*December Term, 1845.*

MOTION by defendant to set aside judgment, on the ground that no declaration had been served on him.

The deputy sheriff started to serve a declaration on the defendant, and met him in a wagon on the highway. The deputy, who was known to the defendant, asked him to stop, saying that he wanted to see him. The defendant replied, "you can't see me to-day, sir," and rode on; before he had got fifteen feet off, the deputy cried out after him, in a voice loud enough to be heard, that "he had a declaration to serve on him at the suit of Stephen Van Rensselaer's executors, which he wanted him to take." The defendant made no reply, but kept riding on. The next day the deputy went to the defendant's house, and searched for him through all the rooms on the first floor, which, however, were empty; he tried to go up stairs, but found the stair door fastened on the inside. It was probable, from all the affidavits,

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Van Rensselaer agt. Palmatier.

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that the defendant saw the deputy coming to his house and hid himself to avoid service. The deputy then gave the declaration to one Hiller, who was at work in a woodshed near by, and who occupied part of defendant's house, requesting him to give it to the defendant. After the deputy went away the defendant saw Hiller, and Hiller told him that "he had received a paper from the man who had just gone away, but that he (the defendant) should not see it." Hiller had examined the declaration and found that as he said "it was a suit for rent, as he understood it, and supposing from what he had heard and understood in that town, that the tenants of Van Rensselaer did not wish to be served with process, he, deponent, did not ever at any time *give* said paper to the defendant, and never *showed* it to him, but purposely kept it from him." Hiller did not state whether he did or did not tell the defendant the contents of the declaration, nor did the defendant deny that he knew the contents of the declaration. The declaration was brought to the sheriff's office in Albany some days after, and it would seem Hiller told the sheriff's son that Mr. Palmatier directed him to bring the declaration back and say to him that it was served on the wrong man. The sheriff's son would not accept it, and Hiller carried it away and left it at a grocery, telling its keeper to give it the sheriff. The defendant swore that no declaration in the suit had ever been *served* upon him by the sheriff or his deputy or any other person. It was not denied by Hiller or the defendant, that the defendant sent Hiller back to \*the sheriff's office with the declaration, with [\*26] word that it had been served on the wrong man. The deputy further swore, that it was a matter of the utmost difficulty to serve process in favor of Stephen Van Rensselaer, that the tenants throughout the manor of Rensselaerwyck knew, by signals familiar to them and easily interchanged, when the sheriff was out, and that on such occasions they would hide and get out of the way to avoid service of process, and that he had no hopes of ever finding the defendant to *serve* a declaration on him unless it was by accident.

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 Stacy agt. Farnham.
 

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R. W. PECKHAM, *defendant's counsel.*

PECKHAMS & COLT, *defendant's attorneys.*

S. WILKESON, JR., *plaintiffs' counsel.*

VAN VECHTEN & WILKESON, *plaintiffs' attorneys.*

JEWETT, Justice. Held, that the declaration was not personally served, and that no service short of personal was good, and ordered the judgment to be set aside.

Motion granted with costs.

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WILLIAM STACY agt. LE ROY FARNHAM.

Where an under sheriff executes an attachment and takes property into his custody upon it, and a writ of replevin is afterwards issued against the under sheriff to replevy the property; such writ of replevin may be directed to and executed by the sheriff, of which the defendant is under sheriff. The suit is neither brought by or against the sheriff. (2 R. S. 533, § 67.)

An affidavit made by the plaintiff of ownership, &c., annexed to a writ of replevin; *should not be entitled.*

*December Term, 1845.*

MOTION by defendant to set aside writ of replevin and proceedings for irregularity.

This motion was made on two grounds; 1st, because the writ should have been directed to and executed by the coroner; and 2d, on the ground that the affidavit annexed to the writ should not have been entitled. It appeared in this case that the writ of replevin was directed to the sheriff of Erie county, and served by one of his deputies on the defendant, who was under sheriff of Erie. The defendant as under sheriff had previously received a warrant of attachment issued to the sheriff of Erie, and had attached the property mentioned in the writ of replevin and held it under the attachment, until it was replevied from him, as stated. The affidavit attached to the writ of replevin was entitled in the suit, being a printed form, and the common affidavit of ownership, &c.

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Hinman agt. Wilson.

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GEO. W. HOUGHTON, *defendant's counsel and attorney.*

GEO. L. MARVIN, *plaintiff's counsel and attorney.*

JEWETT, Justice. This suit is neither brought by or against the sheriff of Erie, (2 R. S. 533, § 67,) therefore the writ of replevin was properly \*directed to and executed by him. [27] The affidavit of ownership of property, &c., annexed to the writ should not have been entitled; for the reason it is informal and defective, but it may be amended. (*Cutler agt. Rathbone, sheriff, 1 Hill, 204, and cases there cited.*) The plaintiff may, therefore, amend the defect in the affidavit by making and filing a new affidavit annexed to the writ without costs. (Rule 61.)

Rule accordingly.

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RUSSELL HINMAN, by his next friend, &c. agt. ROBERT T. WILSON.

*Facts and circumstances* should be stated in an affidavit to hold to bail; information and belief that defendant is about to depart from the county, &c., is not sufficient. (*See 1 Howard's Practice Reports, 251.*)

*December Term, 1845.*

MOTION by defendant to vacate an order of supreme court commissioner, holding defendant to bail.

The defendant was arrested on a capias for assault and battery, and an order of a supreme court commissioner indorsed thereon, requiring him to be held to bail in \$500. The defendant's counsel objected to the affidavit holding defendant to bail; that part of the affidavit objected to, stated "that he is informed and believes, that the said Robert T. Wilson is about to depart and leave the county of Greene, his place of residence, and from the above information and other circumstances attending the above assault, this deponent is fearful that unless an order to hold to bail is obtained, the said Robert T. Wilson will leave the county," &c. Defendant's counsel

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Sheridan agt. Kelly.

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cited 1 *Howard's Practice Reports*, p. 251, showing that *information and belief*, that defendant was about to leave the county, &c., was not sufficient; the *facts and circumstances* should be stated, that the officer might be able to judge from them, whether the defendant was about to leave, &c.

L. TREMAIN, *defendant's counsel and attorney.*

G. W. CUMMING, *plaintiff's counsel and attorney.*

JEWETT, Justice. Held the affidavit insufficient for the reasons assigned, and ordered that the order holding defendant to bail be vacated, and that the bail bond given to the sheriff be delivered up with costs, plaintiff to file security for costs, &c.

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ROBERT HIGHAM agt. JOHN HAYES.

An affidavit of merits used for any purpose, *must be entitled.*

*December Term, 1845.*

MOTION by defendant to set aside inquest.

This motion was denied with costs, for the reason that the affidavit of merits produced by defendant *was not entitled.*

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[\*28] \*ABRAHAM SHERIDAN agt. OTHNIEL KELLY.

Where an inquest was taken at the circuit against defendant on promissory notes and one of defendant's attorneys was sick and unable to attend the circuit, and his partner was out of town attending a justice's court; it was held that the excuse was not sufficient to open or set aside the inquest, although the defendant swore to merits.

*December Term, 1845.*

MOTION by defendant to set aside inquest and verdict.

This was an action of assumpsit on two promissory notes. An inquest was taken in the cause on the second day of the circuit—the defendant not appearing; one of defendant's at-



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Seymour agt. Rogers.

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torneys stated he was unable by sickness to attend the circuit and serve an affidavit of merits which he had prepared, and to defend the cause, and his partner was out of town at the time; for those reasons an affidavit of merits was not served on the first day of the circuit, and the cause was not defended; the defendant swore to merits. It appeared from plaintiff's papers, that the defendant had promised to pay the notes about the time the suit was commenced; that one of plaintiff's attorneys was in attendance at the circuit on the first day, and on the second day was out of town attending a justice's court; this cause was the only one undisposed of on the calendar, on the second day of the circuit, and was called in its regular order and an inquest taken.

C. K. WATKINS, *defendant's counsel.*

KNOX & WATKINS, *defendant's attorney.*

S. S. VIELE, *plaintiff's counsel and attorney.*

JEWETT, Justice. Held, that the excuse was not sufficient to open the inquest, and denied the motion with costs.

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OTIS SEYMOUR agt. SAMUEL ROGERS *et al.*

Oyer may be amended after the cause has been twice noticed for trial, if application is made as soon as the error is discovered, or if not, a sufficient excuse for the delay is offered, on payment of costs of opposing motion.

*December Term, 1845.*

MOTION by plaintiff for leave to serve a new oyer with the same effect as if the original had been correct.

This was an action of covenant on a lease; plea *non est factum*, giving oyer with notice; issue was joined in July, 1844; cause was noticed for September, 1844, and not tried, and again in February, 1845, and not tried. In August last, defendant's attorney received a stipulation signed by Haight, one of plaintiff's attorneys, to amend oyer, and a letter alleging that the defect had just been discovered, no terms, or con-

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Keefer agt. Keefer.

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ditions were offered for amendment, defendant's attorney declined the stipulation without terms. August 26th, plaintiff's attorney served notice of trial; defendant's attorney [\*29] alleged he had made \*preparations for trial, when on the 1st September, a notice of countermand was served. No further steps were taken until 20th November, when notice of this motion was served. Defendant's counsel insisted that there were laches on the part of plaintiff, his attorneys knew of the defect in February last. Plaintiff's counsel insisted that the laches were fully excused, inasmuch as one of the partners who had the entire control of this cause had been a long time sick, and unable to attend to business, and the defect was not stated to his co-partner until August last, after he had noticed the cause for trial.

S. MATHEWS, *plaintiff's counsel.*

HAIGHT & CHASE, *plaintiff's attorney.*

N. HILL, JR., *defendants' counsel.*

E. G. LAPHAM, *defendants' attorney.*

JEWETT, Justice. Granted the motion on payment of costs of opposing, \$7.

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LEWIS KEEFER, plaintiff in error, agt. HENRY J. KEEFER,  
defendant in error.

A motion made to set aside a writ of error will be denied with costs, where it appears that the writ is not actually returned and filed.

*December Term, 1845.*

MOTION by defendant in error to set aside writ of error and proceedings.

This motion was denied, with \$7 costs, without prejudice, for the reason that the writ of error was not returned and filed in this court.

S. STEVENS, *defendant's counsel.*

WM. ENO, *defendant's attorney.*

R. W. PECKHAM, *plaintiff's counsel.*

A. L. PINNEY, *plaintiff's attorney.*

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Reeve agt. Thorburn.

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## SAMUEL REEVE agt. JOHN THORBURN.

An attorney making an offer to plead and pay costs, &c., under the rule, for the purpose of being let in to plead and defend, *must offer to plead issuably.*

*Quere?* Whether a plea of bankrupt's discharge, *properly* verified, is an issuable plea.

*December Term, 1845.*

MOTION by defendant to set aside default and subsequent proceedings.

This was an action of assumpsit, on promissory notes, and notice that they were the only cause of action. The defendant was a resident of St. Louis, state of Missouri; being in the city of New York at the time the suit was commenced, he employed an attorney in New York to defend the suit; his defence was a discharge under the bankrupt act of the United States, which he had not with him, but on returning home, he procured a copy of his discharge, at the city of Philadelphia, and sent it to his attorney; his attorney prepared a plea of non-assumpsit and a special plea of defendant's discharge under the bankrupt act, and sent it on to \*de- [\*30] defendant at St. Louis, with a request to verify it by an affidavit of merits and return, which was done; in the mean time, the time to plead had expired, and the plaintiff's attorney had entered default, &c.; the defendant's attorney stating that in the pressure of professional engagements, he forgot to procure an order for further time to plead. On the arrival of the pleas, defendant's counsel verified the special plea by an affidavit of his own, and defendant's attorney offered to serve the same with the plea of general issue and affidavit of merits on plaintiff's attorney and pay costs, &c., under the rule, which plaintiff's attorney declined to receive, for the reason that the plea of bankrupt's discharge was verified by defendant's counsel only, and that it *was not an issuable plea*; he offered to receive the plea of the general issue only upon the terms offered.

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Porter agt. Davis.

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S. STEVENS, *defendant's counsel.*

F. ANTHON, *defendant's attorney.*

L. LIVINGSTON, *plaintiff's counsel and attorney.*

JEWETT, Justice. Ordered that the default be opened on payment of \$7 costs, and that defendant plead issuably in ten days from the entry of this order, and take short notice of trial.

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STEPHEN PORTER agt. CALEB DAVIS.

A judgment assigned in due form, and a writing executed back to the assignor by the assignee, stating that he agrees to pay all the moneys collected, to the assignor, after deducting expenses of collection, does not create such an ownership in the judgment that the assignee can set it off against a judgment recovered against him by the defendant in the judgment assigned.

*December Term, 1845.*

MOTION by defendant to set off judgments.

Plaintiff recovered a judgment against defendant in May, 1844, in this court, for \$295.81 damages and costs. *Fi. fa.* issued in August last, and levied on defendant's personal property. In August, 1828, Samuel Works and Jacob Graves, of Rochester, recovered a judgment against the plaintiff Stephen Porter, in this court, for \$224.73. This last judgment was, on the 1st day of September, 1845, assigned by Jacob Graves for himself and Works, to the defendant, Caleb Davis, in the following form; after stating the title and amount, &c.—“For value received of Caleb Davis, we hereby assign, transfer, and set over to him the above judgment, and all our right, title and interest therein, to be by him collected at his own risk and costs. Witness, &c.,” signed and acknowledged before the first judge of Monroe county. Davis, the defendant, alleged and stated that the whole amount of the judgment, principal and interest, was due, and that he became the bona fide assignee thereof for a valuable consideration.

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In the matter of Alexander Connison.

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\*On the part of the plaintiff it was shown by an [\*31] affidavit from Jacob Graves, that no consideration passed between him and Davis for the assignment of the judgment, other than was expressed and set forth in an agreement, which was substantially as follows:—"Received of Jacob Graves a judgment against Stephen Porter, &c., (giving a description of it). It is agreed between the parties, that all the money that can be collected on the judgment, I agree to pay to the said Graves as soon as collected, and if all is collected, then the said Graves is to receive the whole amount after paying the expense of collecting. Rochester, Aug. 11, 1845. Signed C. Davis." Plaintiff swore that he had a good defence to the collection of the judgment. It was insisted on the part of the plaintiff that Davis, the defendant, received the assignment of the judgment for collection only, and that Graves was the beneficial owner of the judgment against the plaintiff.

T. T. DAVIS, *defendant's counsel and attorney.*

J. H. COLLIER, *plaintiff's counsel.*

GEO. B. WALTER, *plaintiff's attorney.*

JEWETT, Justice. Denied the motion with costs, on the ground that Davis was not the owner beneficially of the judgment assigned to him; he merely took it for collection.

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In the matter of ALEXANDER CONNISON.

Proceedings before a judge of the common pleas under the act to abolish imprisonment for debt and to punish fraudulent debtors, passed April 26, 1831, &c., and costs are taxed by a judge of the common pleas against the complainant; an appeal from such taxation to this court does not lie. This court have no jurisdiction of the matter; it is not before them.

*December Term, 1845.*

MOTION for retaxation of costs.

Connison was arrested on application of Charles Ross un-

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 Post agt. Haight.
 

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der the act to abolish imprisonment for debt and to punish fraudulent debtors, passed April 26, 1831, &c., before M. ULSHOEFFER, first judge of New-York common pleas; such proceedings were had, that Connison was discharged with costs against the complainant Ross. The costs were taxed by Hon. C. P. DALY, a judge of New-York common pleas, and opposed on the part of Connison, who appealed from the taxation to this court.

M. T. REYNOLDS, *counsel for Ross.*

J. T. DOYLE, *attorney for Ross.*

J. S. LAWRENCE, *counsel for Connison.*

G. C. GODDARD, *attorney for Connison.*

JEWETT, Justice. This court has no jurisdiction; the proceedings are not before them.

Motion denied with costs.

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[\*32] \*ISRAEL POST, JR. agt. OBADIAH S. HAIGHT.

Where a defendant obtains a judgment of *non pros*, in the common pleas, which remains unpaid, and the plaintiff previous thereto commences a suit in this court, for the same cause of action: on motion, the plaintiff's proceedings in this court will be stayed until the amount of costs for which judgment of *non pros* was entered is paid. The plaintiff cannot set up the irregularity of the judgment in answer to the motion.

*December Term, 1845.*

MOTION by defendant for a stay of proceedings in this cause until costs of judgment of *non pros* in common pleas should be paid.

The defendant obtained judgment of *non pros* against the plaintiff in the court of common pleas of Saratoga county, which was perfected in October last. After the suit was commenced in the court of common pleas, the plaintiff commenced this suit for the same cause of action.

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Barnes agt. Harris.

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The rule entered in the common pleas, granting judgment of *non pros*, was conditional; that the plaintiff pay the costs therein up to that time, within ten days after demand of a bill thereof taxed on notice; the costs were taxed on notice and opposed by plaintiff's attorney; subsequently the defendant's attorney entered the judgment of *non pros*, but afterwards vacated it and gave plaintiff's attorney notice thereof, and also notice to plaintiff's attorney to comply with the conditions of the rule for judgment of *non pros*; that notice was dated October 15, 1845, and on the 27th October, 1845, defendant's attorney entered judgment of *non pros* which he alleged was unpaid and remained due from plaintiff. The plaintiff's counsel insisted and stated from the papers that no demand of the costs for judgment of *non pros* had ever been made of the plaintiff, and that the defendant's judgment was irregularly entered, the rule for judgment of *non pros* not having been complied with by him.

P. CAGGER, *defendant's counsel.*

A. HAIGHT, *defendant's attorney.*

D. WRIGHT, *plaintiff's counsel.*

W. B. LITCH, *plaintiff's attorney.*

JEWETT, Justice. The plaintiff must first get rid of the judgment in another form, if it is irregular; the irregularity cannot be set up in answer to this motion.

Motion granted with \$10 costs.

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ARNOLD BARNES agt. JOHN P. HARRIS.

A default taken at general term and judgment on a demurrer as frivolous, will be opened on terms, where it appears the opposing attorney was mistaken in supposing the notice of argument served on him did not contain a clause that the demurrer would be moved as frivolous, and it appearing that it was *bona fide* intended to be argued, but the papers did not reach counsel in time to argue it.

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 Post agt. Jenkins.
 

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*December Term, 1845.*

MOTION by defendant to open default taken at the last October term, and for leave to argue the demurrer

[\*33] \*The defendant's attorney prepared his papers in this and other causes a week or more before the term, and took them to the court in his county, which he was obliged to attend professionally, with a view to send them to his counsel at Rochester, but not finding an opportunity, he mailed the papers in this cause to his counsel on the 23d of October; they were not received until the 25th October, and after the court had adjourned. Plaintiff's counsel had taken a default and judgment on the demurrer as frivolous. Defendant's attorney stated that he supposed the demurrer was not noticed as frivolous, and did not know that it was until informed by his counsel; he then examined his notice of argument, and found that there was a notice to that effect inserted in it. He offered plaintiff's attorneys costs, &c., to waive the default, which he declined.

N. HILL, JR., *defendant's counsel.*

H. BENNETT, *defendant's attorney.*

D. WRIGHT, *plaintiff's counsel.*

JOHN WAIT, *plaintiff's attorney.*

JEWETT, Justice. Granted the motion on payment of costs of October term, and \$7 costs of opposing motion.

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GEO. D. POST *et al.* agt. SAMUEL T. JENKINS, and three other causes.

Where there are several causes between the same plaintiff and different defendants, and motions in each are made by defendants for judgment as in case of nonsuit, and granted unless plaintiff pay costs, &c., and separate papers for the motions are made, the attorneys being the same in each; the costs for one motion only will be allowed. In such a case the motions might all be made with one set of papers and notice; the attorneys being the same in each.

*December Term, 1845.*

MOTION by defendants in each cause for judgment as in case of nonsuit.



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People agt. Allen.

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These were four causes between the same plaintiffs and different defendants and same attorneys. The motion papers were made out separate, and the motions granted unless plaintiffs stipulated and paid \$10 costs only, including the four motions. It was insisted by defendant's counsel that costs in this motion should be allowed. Plaintiff's counsel insisted that all the causes might have been entitled in one affidavit and notice, and the whole object could have been accomplished by one motion.

P. CAGGER, *defendant's counsel.*

G. B. WOOD, *defendant's attorney.*

H. GRAY, *plaintiffs' counsel.*

GRAY & HATHAWAY, *plaintiffs' attorneys.*

JEWETT, Justice. Allowed costs for one motion only, on the ground that the four motions might have been made in one, and one set of papers only used, the plaintiffs being the same in each cause, and the facts for the motions the same, and the attorneys the same.

\*There was another decision made at the same time [\*34] with the above, and in the same way, where there were 32 causes all the same plaintiff and different defendants and same attorneys; motion was made in each cause for judgment as in case of nonsuit, which was granted unless plaintiff stipulated and paid \$10 costs only, including all the causes. The papers, however, in the last case, differed from the first, there being but one set of moving papers for all the causes.

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THE PEOPLE agt. JAMES H. ALLEN.

A district attorney has authority and discretion given by statute, as to what court he will sue a recognizance in, whether the principal and bail all reside in the county in which the recognizance was taken or not. The case of *The People agt. Backman and Miner* (1st Howard's Practice Reports, 221), overruled.

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People agt. Allen.

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*December Term, 1845.*

MOTION by defendant to set aside amended declaration and subsequent proceedings for irregularity.

This was an action brought by the district attorney of Schenectady, on a recognizance entered into by the defendant as principal with sureties, at the Schenectady general sessions. The principal and sureties all resided in Schenectady county. It was insisted by defendant's counsel that the action should have been brought in the same court in which the original suit was commenced, unless the bail, or one of them, resided out of the county, and cited 1 *Howard's Practice Reports*, p. 221, *The People agt. Backman & Miner*, and cases there cited.

On the part of the people it was insisted that it was made the duty of the district attorney to prosecute recognizances, &c. (2 *R. S.*, 2d ed., 398, § 29), and the pleadings and proceedings should be the same in all respects as in personal actions for the recovery of debts, &c. The manner of collecting fines and recognizances was left to the discretion of district attorneys. (4 *Wend.* 387; 10 *Wend.* 431, 464, 509; 17 *Wend.* 252; 6 *Hill*, 506.) This court never interferes with discretionary power. The cases quoted by the defendant were all cases upon recognizances in the common pleas (not general sessions), and were based upon the ground that the bond should be sued in the same court in which it was taken. This did not apply to recognizances in general sessions; they could not be sued in the court in which they were taken.

JAMES FULLER, *defendant's counsel and attorney.*

P. POTTER, *district attorney, counsel for people.*

[\*35] \*JEWETT, Justice. Thought the authorities cited by the district attorney were conclusive against this motion; the district attorney had discretion by statute, as to what court he would sue the recognizance in; the residence of the bail could make no difference.

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Campbell agt. Self.

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SAMUEL B. CAMPBELL and wife, *et al.* agt. GEORGE SELF.

An *affidavit* by a defendant of the service of a declaration will be held conclusive as to the time of such service, against a sheriff's *certificate*. In such a case the sheriff is put to his affidavit.

*December Term, 1845.*

MOTION by defendant to set aside default and subsequent proceedings for irregularity.

The defendant swore that a copy declaration in this cause was served on him, on Wednesday, the 28th May, 1845, by a person who represented himself as a deputy sheriff; it was served in a field adjoining the highway, where he was at work, and was sure he could not be mistaken as to the time of service. The default of the defendant for not pleading, was entered by plaintiff's attorney on the 17th of June, 1845, in the morning of that day. At 9 o'clock in the morning of the 17th of June, 1845, defendant's attorney served papers for a motion in this cause, and an order staying proceedings upon the clerk of this court, Albany, directed to plaintiffs' attorney, New-York. Plaintiffs' affidavits in opposition to this motion, contained a copy of the deputy sheriff's certificate of the service of the narr, &c., on defendant, by which it appeared the service was made on the 27th May, 1845.

J. KOON, *defendant's counsel and attorney.*

J. MCKOWN, *plaintiffs' counsel.*

P. CLARK, *plaintiffs' attorney.*

It was insisted by defendant's counsel that the default was entered too soon; that the defendant's *affidavit* of the time of the service of the declaration should govern, in preference to the deputy sheriff's *certificate*.

JEWETT, Justice. Held, that the default was irregular; that the affidavit of defendant must control as to the time of service. If the deputy sheriff had made an *affidavit* of the time of service, it would have been a conclusive answer to defendants.

McDonald agt. The Bank for Savings in the City of New-York.

SARAH McDONALD agt. THE BANK FOR SAVINGS in the city  
of New-York.

A poor person, as such, cannot bring a writ of error. The statute authorizing poor persons to sue, etc., does not extend to bringing writs of error.

*December Term, 1845.*

MOTION by plaintiff for leave to prosecute a writ of  
[\*36] error as a poor \*person.

The plaintiff commenced a suit against the defendants in the superior court in the city of New-York, which resulted in a nonsuit. A bill of exceptions was made and settled on the part of the plaintiff. She then presented a petition to this court, for leave to prosecute a writ of error therein as a poor person. The bill of exceptions, and papers on the motion contained the whole case. Defendants' counsel insisted that it did not appear from the papers that there was any error, and, therefore, the motion should be denied; and secondly, this court could not do away with the requirements of the statute in bringing writs of error, where it prescribed that security should be given, &c.

H. HARRIS, *plaintiff's counsel.* .

RAYMOND & CLARK, *plaintiff's attorneys.*

M. T. REYNOLDS, *defendants' counsel.*

GEORGE B. BUTLER, *defendants' attorney.*

JEWETT, Justice. Denied the motion without costs to either party, for the reason that the statute was express in its provisions in regard to bringing writs of error, which provisions must be complied with. There were no exceptions. The statute authorizing poor persons to sue, &c., did not in his judgment extend to writs of error.

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Morris agt. Sliter.

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## RICHARD MORRIS agt. WILLIAM C. SLITER.

Costs noticed for taxation before an officer, and on the day noticed for the taxation the officer is absent, the attorney who gave notice of taxation cannot go before another officer and have them taxed, without giving the requisite notice to the opposite attorney.

*December Term, 1845.*

MOTION by defendant for retaxation of costs, with costs of motion.

Plaintiff's attorney noticed his costs in this cause for retaxation, for the 11th of June, 1845, before Judge GRIDLEY, at his office in Utica. Defendant's attorney forwarded his papers to oppose the taxation to Judge GRIDLEY, which were received in due time. In the absence of Judge GRIDLEY on the day noticed for taxation (holding a circuit), plaintiff's attorney went before another taxing officer and had the costs taxed *ex parte*, without notice to defendant's attorney. On an application by defendant's attorney, and an offer to pay, &c., plaintiff's attorney refused to have them retaxed for the reason, as he stated, that the offer was made some three months after the taxation, and an execution had been issued. Defendant's attorney stated he received a letter from Judge GRIDLEY in July last, stating that he had not taxed the costs, and from that, defendant's attorney supposed plaintiff's attorney would give him notice when they would be taxed; that he applied to plaintiff's attorney as soon as he found the costs \*had been taxed [\*37] by another officer. Plaintiff's attorney stated that he sent his costs to his agent to attend the taxation on the 11th June, and his agent not finding Judge GRIDLEY at home, and no one at his office to oppose the taxation, concluded the taxation was not to be opposed, and went before the clerk of this court, J. L. Beardsley, Esq., and had them taxed.

P. CAGGER, *defendant's counsel.*

F. U. FENNO, *defendant's attorney.*

J. S. MASTERS, *plaintiff's attorney*

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Lansing agt. Mickles.

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JEWETT, Justice. Granted the motion with \$10 costs; on the ground that plaintiff's attorney should have given notice of the taxation before another officer. Defendant's attorney was prepared to oppose, and sent his papers in season to the officer before whom the costs were *noticed* for taxation.

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JACOB S. LANSING agt. PHILO D. MICKLES.

A Supreme Court commissioner's order staying proceedings, after the cause has been noticed for hearing, is a *nullity*. 97 rule.

*December Term, 1845.*

MOTION by defendant to set aside report of referees for irregularity.

This cause was noticed and served on the 28th day of July, 1845, for hearing, on the 18th August, 1845, by plaintiff's attorney on defendant's attorneys. On the 13th of August, defendant's attorneys procured an order to stay proceedings from D. PRATT, Esq., first judge of Onondaga county, for the purpose of moving for a commission on the part of defendant. Defendant's papers for the motion were served, together with a copy the order to stay and a stipulation to pay plaintiff's costs for preparing for hearing to that time on plaintiff's attorney, on the 13th August, 1845. Plaintiff's attorney disregarded the order, &c., and went on with the hearing on the 18th of August, and took a report in his favor for \$255.36; a copy of the report was served on defendant's attorneys on the 30th August. Defendant's attorneys alleged they obtained the order to stay under the 59th rule in good faith, and were not aware that the 97th rule prohibited a Supreme Court commissioner from granting such an order, until they were served with a copy of the report of the referees on the 20th of August aforesaid. Defendant swore to merits. Plaintiff had entered judgment.

A. TABER, *defendant's counsel.*

FORBES & SHELDON, *defendant's attorney.*

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Duel agt. Fisher.

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M. T. REYNOLDS, *plaintiff's counsel*.D. BROWN, *plaintiff's attorney*.

JEWETT, Justice. Defendant must be let in as a matter of favor, if at \*all; he was wrong in procuring [\*38] the order from the Supreme Court commissioner; under the 97th rule, plaintiff had a right to disregard it. Motion granted on payment of costs of reference and subsequent proceedings and of opposing motion, judgment to stand as security.

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HIRAM DUEL *et al.* agt. JAMES FISHER.

A party has eight days to serve notice of appeal from decision of circuit judge from the time notice of the decision is served on him; not eight days from the time of signing the decision by the circuit judge.

*December Term, 1845.*

MOTION by plaintiffs to set aside order of circuit judge, and to dismiss appeal.

The circuit judge denied defendant's motion for a new trial in this cause and signed his decision on the 10th of October, 1845. On the 16th of October, plaintiff's attorney served a notice thereof on defendant's attorney; on the 23d of October, defendant's attorney served on plaintiff's attorney a copy order staying proceedings and notice of appeal to this court, from the decision of the circuit judge. Plaintiffs moved to vacate the order obtained and served by defendant's attorney on the 23d of October, on the ground that defendant's attorney should have served the order within eight days after the signing of the decision by the circuit judge.

S. STEVENS, *plaintiffs' counsel*.B. F. AGAN, *plaintiffs' attorney*.J. W. THOMPSON, *defendant's counsel and attorney*.

JEWETT, Justice. Denied the motion with costs, on the ground that the defendant had eight days from the time of

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Stewart agt. McMartin.

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*service of notice* of the decision of the circuit judge; defendant was regular. (*S. C. Rules*, 82d; 18 *Wend.*, 553; 18 *Wend.*, 590; 22 *Wend.*, 629; 12 *Wend.*, 241; 13 *Wend.*, 656.)

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ARCHIBALD STEWART agt. JOHN McMARTIN, Impleaded, &c.

A defendant who moves for leave to plead his bankrupt discharge *must swear to merits*, in addition to setting forth his discharge.

*December Term, 1845.*

MOTION by defendant McMartin, for leave to plead his bankrupt discharge.

This suit was commenced some year and a half after defendant McMartin had been discharged from his debts under the bankrupt law; on a note given by him previous to the application for his discharge. McMartin alleged he was [\*39] ignorant of legal proceedings and when the \*declaration was served on him, he did not trouble himself about it, supposing that his bankrupt's discharge which he had was a protection to him against any judgment, without any thing being done on his part, and did not consult any counsel on the subject, until a creditor's bill was served upon him, and alleged that the plaintiff and his attorneys well knew that he had been discharged. McMartin did not swear to merits on the motion; he set forth a copy of the discharge.

A. TABER, *defendant's counsel.*

COREY & VANDERVEER, *defendant's attorneys.*

N. HILL, JR., *plaintiff's counsel.*

BELDING & COCHRANE, *plaintiff's attorneys.*

JEWETT, Justice. Denied the motion with costs without prejudice, on the ground that the defendant had not made an affidavit of merits.



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St. John agt. Lyon.—And four other causes.

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HENRY J. ST. JOHN *et al.* agt. SIMEON LYON.

And four other causes, same plaintiffs.

A motion for judgment as in case of nonsuit will be denied with costs, where it appears that a prior suit was tried upon which the same questions depended to maintain the action, and important questions of law were raised, and exceptions taken on the trial, and the circuit judge refused to try any more causes depending upon the same questions of law and same state of facts, until this court had determined those questions; and where in addition it appeared one of the plaintiffs had died after issue joined, and no proceedings had been taken to revive the suit.

*December Term, 1845.*

MOTION by defendant for judgment as in case of nonsuit.

These causes were actions of ejectment, issues joined in all of them in August, 1844; the plaintiffs all resided in Europe; defendant's papers stated that three circuits had passed at which the causes might have been tried. On the part of the plaintiffs, it appeared that the same plaintiffs commenced a suit against one West, in an action of ejectment, by which they claimed to recover on the same title and on the same state of facts, as they claimed to recover upon in these suits; the cause against West was tried at the Ontario circuit, in May, 1844, and a verdict taken for the plaintiffs, for three-fifths of nine-elevenths of the premises claimed; there were other causes at the same circuit on the calendar in favor of the same plaintiffs against different defendants, depending upon the same title and state of facts as in the case of West. The circuit judge refused to try any more of the causes until the case or bill of exceptions taken by defendant's counsel should be determined by this court, as there were important questions of law involved in the case; the recovery in the suit against West was in favor of William James St. John, one of the plaintiffs, a title as was held by the circuit judge having been shown in him. Subsequent \*to joining the issues in these causes, [\*40] William James St. John died, and since his death no proceedings had been taken to revive the suits; such delay

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Cooper agt. Weed.—Same agt. White.

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was alleged to have been occasioned by reason of a question of difficulty, arising out of the will of William James St. John, and some doubt as to the persons who were entitled to recover as his heirs at law.

A. TABER, *defendant's counsel*.

B. F. COOPER, *defendant's attorney*.

N. HILL, JR., *plaintiffs' counsel*.

SIBLEY & WORDEN, *plaintiffs' attorneys*.

JEWETT, Justice. Denied the motion with costs, upon the state of facts shown by the plaintiffs.

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JAMES FENNIMORE COOPER agt. THURLOW WEED.

SAME agt. WM. WHITE and VISSCHER TEN EYCK.

Two suits for libel, one against the editor and the other against the proprietors of a newspaper, being different persons, cannot be consolidated, although it appears that both actions are for the same alleged libel, the declarations in each and the pleas in each the same, and that substantially the same facts and questions on the part of the prosecution will arise in each, and substantially the same defence in each.

*Quere?*—Whether actions for libel can be consolidated.

*December Term, 1845.*

MOTION by defendants to consolidate these two causes into one.

These were actions of libel, and were commenced for one and the same identical alleged libel, printed in the Albany Evening Journal, of which the defendant in the first cause was editor, and the defendants in the second cause were proprietors.

The declarations in each and pleas in each were the same. It was alleged that the questions which would arise in both actions were substantially the same, and the defence in each would substantially be the same.

M. T. REYNOLDS, *defendants' counsel*.

BEACH & MORGAN, *defendants' attorneys*.

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Brown agt. Cook.

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N. HILL, JR., *plaintiff's counsel.*R. COOPER, *plaintiff's attorney.*

JEWETT, Justice. Denied the motion with costs, on the ground that suits under such circumstances could not be consolidated; the parties were not the same, and it might be that as against one party there would be proof in aggravation of damages, which would not be against the other.

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## GEORGE BROWN agt. BENJAMIN C. COOK.

The *place* of residence of an attorney (upon whom papers are served for a motion), *must be stated in the affidavit of service*, otherwise it will be held bad proof of service.

*December Term, 1845.*

MOTION by defendant to change venue.

An objection was taken to the \*making of this mo- [\*41] tion, on the ground of defective proof of service of the papers. The affidavit of service read as follows, ("title of the cause,") "Livingston county, ss.: Moses Stevens of Dansville, in said county, being duly sworn, says, that he at the request of Benjamin C. Cook, the defendant in person in this cause, did on the 25th day of September last serve the plaintiff's attorneys with a copy of the foregoing affidavit, notice of motion and order staying proceedings in this said cause, and that the said service was made by carefully enveloping said copy affidavit, notice of motion and order in a wrapper, and putting the same in the post-office directed to Spencer & Kernan, the said attorneys for the said plaintiff in this cause, at their place of residence, and paying postage thereon." It was objected that the affidavit did not state *the place* of residence of the attorneys.

A. TABER, *defendant's counsel.*B. C. COOK, *defendant in pro. per.*

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Livingston agt. McIntyre.

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N. HILL, JR., *plaintiff's counsel.*

SPENCER & KERNAN, *plaintiff's attorneys*

JEWETT, Justice. Denied the motion with costs without prejudice, on the ground that the place of residence of the attorneys was not stated in the affidavit of service.

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JOHN D. LIVINGSTON agt. JOHN MCINTYRE AND EDWIN SMITH. Two causes between the same parties.

A suit cannot be severed at the circuit, and an inquest taken against part of the defendants, where the cause was at issue against all of the defendants and might have been noticed for trial against all of them.

*December Term, 1845.*

MOTION by defendants to set aside inquest in each cause, and subsequent proceedings for irregularity.

These actions were originally brought against Peter Comstock and Elisha A. Martin, as drawers of two several drafts, and the defendants as the acceptors; the defendants were sued as copartners, under the name of McIntyre & Smith, and the other defendants under the name of Comstock & Martin; all the defendants appeared and pleaded in the causes, and issues were joined therein on the 9th of March last. Plaintiff's attorney noticed the causes for trial and inquest, against McIntyre & Smith only, and took an inquest against them on the 27th June last. Defendants' attorneys stated that the cause was ready for trial against all the defendants after the last issue was joined on the 9th of March last.

M. T. REYNOLDS, *defendants' counsel.*

JOHNSON & WATERS, *defendants' attorneys.*

P. CAGGER, *plaintiff's counsel.*

WM. C. SCHUYLER, *plaintiff's attorney.*

JEWETT, Justice. Granted the motion with costs, [\*42] on the ground that \*the suits could not be severed at

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Bell agt. Judson.

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the trial, and inquests taken against two defendants only; they should have been noticed for trial and inquest against all the defendants' issues having been joined as to all.

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SAMUEL BELL agt. HIRAM JUDSON.

Where plaintiff's attorney offers to pay all costs defendant's attorneys are entitled to (before making motion), to be allowed to add a special count to his declaration upon a promissory note; where it is against a surety, defendant's attorneys will not be allowed costs, if they resist the motion.

*December Term, 1845.*

MOTION by plaintiff for leave to amend his declaration, by adding a special count.

This action was brought upon a joint and several promissory note, signed by "D. W. Barker & Co.," and "Hiram Judson security for the above," the suit was commenced in April last, the declaration contained the common money counts only, with a copy of the note, and notice that it was the only cause of action; defendant appeared and pleaded general issue. Plaintiff's attorney stated that after the commencement of the suit, the decision in *Butler agt. Rawson, im'd, &c.*, in May term last, was made by this court, by which he was advised he could not give in evidence the note declared on, he also stated he had called on one of defendant's attorneys and offered to pay him the costs of his plea, to be allowed to add a count upon the note in the declaration, defendant's attorney declined to accept it, or to allow it upon any terms.

A. P. THOMPSON, *plaintiff's counsel and attorney.*

FORBES & SHELDON, *defendant's counsel and attorneys.*

JEWETT, Justice. Granted the motion *without costs.*

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Bank of Chillicothe agt. Dodge.

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THE BANK OF CHILICOTHE agt. DAVID B. DODGE.

A plaintiff may amend his declaration upon terms, after issue joined, by adding two or more new counts for the same cause of action, setting forth a special agreement.

*December Term, 1845.*

MOTION by plaintiffs for leave to amend their declaration by adding two or more new counts for the same cause of action.

This action was commenced by declaration containing the common money counts, to which was subjoined a bill of exchange, as follows: "\$5,000—Farmers' Bank of Seneca county, three months after date, pay to the order of R. D. Dodge, five thousand dollars and charge this institution. Romulus, Sept. 30th, 1839. G. P. Hosmer a cashier, to Walter Mead, Esq., cashier, New-York, indorsed Reuben D. [43] Dodge, D. B. Dodge." The defendant \*pleaded the general issue with the usual notice of set-off, verified by affidavit, and an affidavit that the defendant had not been served with notice of the non-payment or non-acceptance of the bill of exchange. Plaintiffs' attorney stated that after he received the plea, he was advised that at the time the defendant indorsed and delivered to the plaintiffs the bill of exchange, he promised, undertook, and agreed with the plaintiffs, and represented to them, that the drawers of the bill of exchange were an incorporated banking company, authorized to draw and negotiate bills of exchange, and were a good and responsible corporation or bank, and that after he had received the plea he was advised that there never was any such body corporate as the Farmers' Bank of Seneca county, authorized to draw and negotiate this bill of exchange; that it was necessary for the plaintiffs to add two or more new counts to their declaration for the same cause of action, setting forth the special agreement and undertakings of the defendant with the plaintiffs in that behalf.

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Garlock agt. Bellinger.

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JNO. MCALISTER, *plaintiffs' counsel and attorney.*

KNOX & WATKINS, *defendant's counsel and attorney.*

JEWETT, Justice. Granted the motion on payment of defendant's costs of pleading, and \$7 cost of opposing motion.

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CHARLES GARLOCK agt. ANDREW BELLINGER.

A declaration may be amended under the rule by substituting a count in debt for a count in assumpsit, for the same cause of action.

*December Term, 1845.*

MOTION by defendant to set aside amended declaration.

Plaintiff's attorney first commenced this suit by declaration, which contained the common money counts in assumpsit, and a count in debt on justice's judgment. Defendant's attorney demurred specially to the declaration. Plaintiff's attorney served an amended declaration, substituting money counts in debt, for the money counts in assumpsit, and also asserted the count in debt upon justice's judgment. It was objected by defendant's counsel that such an amendment could not be made under the rules; it was adding a new count.

J. H. COLLIER, *defendant's counsel.*

A. G. COLE, *defendant's attorney.*

D. BURWELL, *plaintiffs' counsel.*

H. LINK, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion with costs, on the ground that the amendment was not a new count within the meaning of the rule, the cause of action was the same.

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Sizer agt. Miller.

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[\*44] \*SIMEON P. ALCOTT *et al.* agt. SAMUEL DAVISON.

Where a motion is made to set off judgments, the moving papers should be entitled in all the causes which contain the judgments to be set off, whether in this court or some other.

*December Term, 1845.*

MOTION by defendant to set aside execution and to set off judgments.

This was a motion by defendant Davison to set off three judgments against the amount of the judgment in this cause, two of them were in this court, and one in Monroe common pleas. The defendant's papers for the motion were entitled only in this cause. Plaintiff's counsel objected to the entitling of defendant's papers.

L. FARRAR, *defendant's counsel and attorney.*

N. HILL, JR., *plaintiffs' counsel.*

L. DRURY, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion with \$7 costs without prejudice, on the ground that the papers were not properly entitled; they should have been entitled in all the causes which it was intended to set off judgments in.

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HENRY H. SIZER agt. JAMES MILLER, DAVID BURT, JABEZ  
GOODELL, ROBINSON MOREHEAD and R. H. LEE.

Where a written agreement is entered into between the parties to a suit, for the purpose of settlement, and a judgment is confessed by the defendants to the plaintiff for the amount of indebtedness, which judgment by the terms of the agreement is to be paid in a special manner, and within a stated time; the plaintiff will not be at liberty to enforce the collection of the judgment, until the defendants have had the full benefit of all the provisions of the agreement, according to its true sense and meaning.

*December Term, 1845.*

MOTION by defendant to set aside execution.



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Sizer agt. Miller.

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James Miller, as principal, and the other defendants, as his sureties, in 1837 made their joint and several promissory note for \$12,000, which Miller negotiated with the assignees of Benjamin Rathbun; on the sale of the property and effects of Rathbun, Henry H. Sizer, the plaintiff, purchased the note. Sizer, soon after the purchase, commenced a suit in this court against the defendants upon the note; after several trials without a verdict, in order to terminate the litigation, the suit was settled, and in pursuance thereof an agreement was entered into in writing on the 14th of April, 1843, between defendant James Miller and Henry H. Sizer, the plaintiff, the principal provisions of which were, after reciting that Sizer having purchased the note under a decree of the court of chancery at public auction by the assignees of Rathbun, with the right and benefit to Sizer of a lien upon the \*divi- [\*45] dend or dividends to be declared on a claim allowed to Miller against the estate of Rathbun for about \$12,256, and that a *relicta* and cognovit had been given by the defendants in this suit in favor of Sizer, for the sum of \$3,000 damages, and judgment was to be entered in the suit for that sum; and for the purpose of paying and discharging the judgment to be entered on the cognovit, Sizer and Miller agreed that Sizer should accept and receive the dividends on the claim in favor of Miller, at and for the sum of \$7,000, and as a payment to that amount on the judgment; and Miller agreed that he would within nineteen months from that date, at his own expense, cause the title in fee simple to two parcels of land in Buffalo to be vested free from all incumbrance and right of dower in Sizer, and furnish evidence thereof to the satisfaction of Heman B. Potter and Nathan K. Hall, counsellors-at-law, Buffalo; which title should be vested either by a direct conveyance to Sizer, or by a sale under execution in the following manner. That Jabez Goodell, one of the defendants, by virtue of a judgment he then held against Miller, should cause the two parcels of land to be advertised, and sold by the sheriff of Erie county, and that Sizer should bid off the premises at \$1,000; Goodell assigning to him \$1,000 of the judgment for

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Sizer agt. Miller.

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that purpose, and Sizer should accept of the title to the premises for the sum of \$1,000, to be applied in part payment and satisfaction of the judgment in this cause, and in case the premises should be redeemed, Sizer should accept the money paid on the redemption in place of the title to the premises, and in such case Miller should be discharged from his obligation to perfect the title to the premises in Sizer. Sizer should take the dividends at his own risk, except as to the acts of Miller subsequent to the original making of the note; if they were lost to Sizer in consequence of such acts of Miller, Sizer should be at liberty to collect on the judgment \$8,500, with interest and expenses of collection from the date of the agreement. The agreement also provided for the payment of the costs of the suit, and that the receiver of the Commercial Bank of Buffalo should, within sixty days, approve of the agreement and give his assent to the receipt of the dividend by Sizer.

Miller stated that, in pursuance of such agreement, the defendants gave a *relicta cognovit* for \$8,000, upon which a judgment was entered by Sizer. On or about the 28th November, 1843, Austin, the receiver, paid over to Sizer \$7,000, the amount awarded to Miller, which amount was paid upon the judgment in this cause, leaving a balance of \$1,000 to be paid as further provided by the agreement. In pursuance [\*46] of the agreement, \*Jabez Goodell on the 12th February, 1844, assigned to Sizer \$1,000 of his judgment against Miller, that Sizer might purchase the real estate described in the agreement, and that on the 12th of February, 1844, the real estate was purchased by Sizer at sheriff's sale, under the Goodell judgment for \$1,000; but in consequence of some defect in the description of the premises in the notice of sale, it was advised by N. K. Hall, Esq., to advertise anew, which was done, and the premises again sold on the 28th March, 1844, to Sizer, for \$1,000. Hall, after having examined the title to the land, thought there might be doubt about it under the sale; and in order to quiet it, a motion was made (by the advice of Hall), to this court at June special

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Sizer agt. Miller.

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term, 1844, and both sales set aside; afterwards the same premises were again advertised and sold by the sheriff, and bid off by Sizer for \$1,000, on the 1st of August, 1844. Subsequent to the time that the Goodell judgment became a lien upon the premises sold, Miller conveyed the same premises to one Haines, and Haines had conveyed his interest therein to Sizer for the purpose of perfecting the title in him pursuant to the agreement. Miller also stated that the *relicta* cognovit was given to Sizer solely, in reference to its being paid as stipulated in the agreement; and that, if, at the expiration of fifteen months from the day of sale (the 1st of August, 1844), the land should not be redeemed by judgment creditors, and the title should not be perfected in Sizer, that he (Miller) would be ready and willing to perfect it, under the direction of Potter and Hall, under whose direction the whole matter was placed by the agreement. On the 24th May last, an execution on the judgment in this cause was issued, to collect \$1,000, and interest from the 14th April, 1843, and levy made on each of the defendants' property.

On the part of Sizer, it appeared from the affidavit of N. K. Hall, that on the examination of the certificate of search procured by Miller, it appeared that only an undivided half of the premises described in the agreement had ever been conveyed to Miller, and that only an undivided half thereof would pass under the sheriff's sale, and he so informed Miller. Miller informed him that the title to the other undivided half of the premises was in one Haines; that Miller procured a conveyance from Haines to Sizer of the undivided half of the premises, and delivered it to him for examination. On inquiry of Miller, he learned that the premises were conveyed to Haines for the purpose of enabling him (Miller) to apply them in payment of his debts, without having them bound by the dockets of judgments against him (Miller), and that Haines had, by the \*understanding between him and Miller, no interest [\*47] therein, but had taken a conveyance thereof under an arrangement with Miller, for the purpose mentioned, and also that Haines had in fact paid nothing for the premises and

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Sizer agt. Miller.

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had no interest therein, that the conveyance was held for the benefit of Miller, and to be disposed of according to Miller's directions; he also learned from Miller, that he (Miller) was considerably indebted to sundry persons at the time of such conveyance to Haines. Hall then stated to Miller that he could not certify that Sizer would get a good title under the sheriff's sale and the quit claim deed from Haines, for the reason that the persons, who were creditors of Miller at the time of the conveyance to Haines and whose debts were still unpaid, might file a bill in chancery, and on showing that Miller paid the consideration of such conveyance to Haines, and that the conveyance was made to Haines for Miller's benefit, might reach the premises in the hands of Sizer and obtain a decree for the sale thereof, and the application of the proceeds of such sale to the payment of such debts. Hall then understood from Miller and otherwise, that a creditor's bill on such debts had already been filed and was pending against Miller, and he suggested to Miller that the undivided half of the premises could be reached in such chancery suit. It further appeared from an affidavit of Dennis Bowen, law partner of N. K. Hall, that he bid off the premises for Sizer at each of the sheriff's sales, upon the representations of Miller that the premises were free and clear of all incumbrances, and that the title was in Miller; he told Miller at the time of the sale, that when the certificate of the clerk was obtained, if it should appear that there was any incumbrance upon the premises, or that the whole thereof was not bound by the judgment, that Sizer would not consider the same binding upon him. Miller in reply stated, that the purchaser under the sale would get a perfect title to the whole of the premises, and that he (Miller) was willing that the sale should be treated as void and of no effect, in case it should appear upon the examination of the certificate of search, that the title was not in him at the time of the docket of the judgment in favor of Goodell, free and clear of all incumbrance, and that the purchaser thereof would not get a perfect title to the whole of the premises. Bowen stated that soon after the last sale of the premises, he discovered that Miller was not the owner of

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Sizer agt. Miller.

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the whole of the premises at the time the judgment in favor of Goodell was docketed, that he then gave notice to Miller that Sizer would disregard the sale and treat the same as of no effect unless a title should be immediately perfected in Sizer, to the undivided half of the premises which \*be- [\*48] longed to Haines at the time the Goodell judgment was docketed. Bowen also stated that he never had any authority to extend the time for the performance of the agreement between Sizer and Miller, and never gave Miller to understand that the time would be extended for the performance of the agreement beyond the time mentioned in the agreement. Sizer stated in his affidavit, that the nineteen months given to Miller by the agreement to perfect the title to the premises therein mentioned, &c., expired on the 14th November, 1844, and that he had never extended the time limited for that object.

B. THOMPSON, *defendant's attorney.*

S. G. HAVEN, *plaintiff's attorney.*

JEWETT, Justice. The execution was irregularly issued, and must be set aside. The ground assumed by the plaintiff is, that inasmuch as Miller had neglected to cause the title in fee simple, &c., to the two parcels of land described in the agreement between them of the 14th of April, 1843, to be vested in Sizer within nineteen months from that date, and to furnish evidence thereof to the satisfaction of Potter and Hall, that Sizer was at liberty at any time thereafter to collect the \$1,000 remaining after the \$7,000 had been paid, by an execution on the judgment against all of the defendants. The agreement contemplated that Goodell would assign to Sizer \$1,000 of his judgment against Miller, being the eldest judgment against him, under which the premises described in the agreement should be sold; Sizer should bid the premises off at that sum, and if the premises were not redeemed and a good title in fee simple, free from incumbrances, vested in Sizer by that sale or by any other conveyance procured to him by Miller, evidence of which Miller should furnish to the satisfaction of Potter and

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Sizer agt. Miller.

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Hall, then the judgment was, after the payment of the \$7,000, to be deemed satisfied; or if the premises should be redeemed, Sizer was to receive the money to be paid in that way, in satisfaction of the remainder of his judgment, in lieu of the title to the land, *and in that case* Miller was to be discharged from his obligation to perfect the title to the land in Sizer. It was no doubt understood between the parties, that fifteen months after the sale was the limit in which any person had the right to redeem, and to give ample time, as they supposed, to make a sale, they provided nineteen months in which a sale was to be made, time for redemption to expire, and Miller in the event that no redemption was made to cause the title to be vested, and to furnish such evidence as should satisfy Potter and Hall of that fact. But some mistake occurred, by which it became necessary that two sales made under the [\*49] . \*Goodell judgment assigned to Sizer were set aside, at the instance and with the assent of both Miller and Sizer. A third and last sale took place on the 1st of August, 1844, at which Sizer was the purchaser at \$1,000; and if he acquired a good title by that or by any other conveyance, or the premises should be redeemed, his judgment by the agreement would be satisfied, and if redeemed, Miller discharged from perfecting the title in him. The time for redemption expired on the 1st day of November, 1845; until then it could not be known whether it would be necessary for Miller to perfect the title in Sizer or not, as perhaps the sale might be redeemed. The acts of Sizer as well as the acts of Miller show clearly that the time limited to nineteen months by the agreement was extended. Miller was not in default in perfecting the title and furnishing the evidence of it, until the time for redemption had expired; which had not elapsed, within more than five months when the execution was issued. Notice of this motion was given in June, which has stood over to this term, by the consent or arrangement between the parties.

Motion granted.

ISAIAH BANGS *et al.* agt. ELIAS AVERY, Impleaded, &c.

An execution issued after defendant's bankrupt discharge, upon a judgment rendered before the discharge, and levied upon property alleged to have been acquired afterwards, will be allowed to retain its levy, until an action can be brought upon the judgment to try the validity of the discharge, where fraud is alleged in procuring the discharge.

*December Term, 1845.*

MOTION to set aside *fi. fa.* and levy, &c.

In October term, 1839, the plaintiffs recovered a judgment in this court against the defendants for \$7,965.45 in an action of covenant. On the 22d March, 1843, Elias Avery, one of the defendants, was discharged under the bankrupt law of the United States. In September last an execution was issued on the judgment, and levied upon property alleged by Avery to have been acquired after his discharge. The plaintiffs alleged fraud in the procuring of Avery's discharge.

A. TABER, *defendant's counsel.*

L. FARRAR, *defendant's attorney.*

S. MATTHEWS, *plaintiffs' counsel and attorney.*

Mr. Taber, for the defendant, insisted that this court would not try the question of the validity of a bankrupt's discharge upon affidavits; that the discharge, being the judgment of a court of competent jurisdiction, must be held to be valid until impeached by a judicial proceeding in the manner pointed out by the 5th section of the bankrupt act; that consequently, when the *fi. fa.* in question was issued, not only then, but up to this time \*it must be taken to have been [\*50] issued without any judgment to support it, the judgment having been discharged by the District Court of the United States. He also insisted that the *fi. fa.* was irregular and ought to be set aside absolutely; that the only mode in a court of law, of testing the validity of a bankrupt's discharge, was by action on the judgment, not by issuing an irregular and unauthorized execution.

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Williams agt. Raymond.

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JEWETT, Justice. Upon the authority of *Bangs & Olcott* agt. *Strong & Strong*, 1 *Howard's Practice Reports*, 181, retained the levy subject to a suit to be brought on the judgment, as in the case cited.

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LUTHER D. WILLIAMS agt. LEWIS W. RAYMOND.

A motion to set aside proceedings before a sheriff on a writ of inquiry upon the merits, can only be heard at general term.

*December Term, 1845.*

MOTION by plaintiff to set aside a rule directing a writ of inquiry to issue; the writ of inquiry and all subsequent proceedings by defendant.

This was an action of replevin, commenced by plaintiff against defendant: after the cause was at issue, and in March last it was discontinued by stipulation of plaintiff's attorney and consent of defendant's attorney. In September last, defendant's attorney entered a rule in the common rule book, reciting that plaintiff's attorney had given notice of a rule for discontinuance in the cause, and it was ordered judgment of discontinuance, and that a writ of inquiry issue to assess the damages of defendant for the detention of the property, replevied by plaintiff. The writ of inquiry was subsequently issued and an inquisition taken by a sheriff's jury, at which testimony was taken on the part of the defendant; the plaintiff's attorney offered evidence on his part, which was objected to by defendant's attorney, and rejected by the sheriff. Plaintiff's attorney then offered to cross-examine defendant's witnesses to certain points, which was rejected by the sheriff. The evidence given on the inquisition was set forth in plaintiff's moving papers, and brought up in the argument upon the merits.

W. H. KINNEY, *plaintiff's counsel.*

T. T. LOOMIS, *plaintiff's attorney.*



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Comstock agt. Stowell.

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N. HILL, JR., *defendant's counsel.*E. W. DODGE, *defendant's attorney.*

JEWETT, Justice. Denied the motion with costs, on the ground that a motion to set aside proceedings before a sheriff, on a writ of inquiry upon the *merits*, can only be heard at general term.

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ALLEN COMSTOCK agt. HORACE STOWELL, sheriff, &amp;c. [\*53]

Where a suit in replevin is discontinued, the plaintiff not being able to give the requisite sureties, and written notice of such discontinuance is served on the sheriff, from whom the property is replevied, and all costs are paid, and the sheriff agrees to accept the property back into his possession; and subsequently the sheriff returns all the executions *nulla bona*; under which he had levied upon the replevied property: the execution creditors afterwards, on motion for judgment of discontinuance of the replevin suit, cannot have a return of the property to the sheriff, and consequently no right to a judgment for the value; if they have been injured, their remedy must be against the sheriff.

*February Term, 1846.*

MOTION by defendant for judgment of discontinuance in replevin.

This suit was commenced on or about 9th July, 1845, by the plaintiff, against the defendant as sheriff of Washington county, who had levied upon the steamboat "Francis Saltus," by virtue of certain executions. On or about the 9th July, 1845, defendant's attorney served notice of retainer and exception to the bail given on the commencement of the suit on plaintiff's attorney, and subsequently served notice of exception to the bail on the coroner who replevied the boat. On the 26th July, 1845, plaintiff's attorney procured an order for thirty days further time for sureties to justify; the time expired and the sureties did not justify. This motion was noticed for December special term last, and ordered to stand over to the present term. On the 3d December last, plaintiff's attorney served on defendant's attorney a notice discontinuing this suit, and consented that the property replevied be returned to the possession of P. C. Hitchcock, deputy sheriff, in the

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Comstock agt. Stowell.

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[\*54] same plight as when it was replevied; \*being the steamer "Francis Saltus" and tackle; protesting, however, and claiming that the stipulation should never be any evidence that the plaintiff did not own the boat. On the same day paid to the deputy sheriff Hitchcock the amount of defendant's costs of the suit, including the costs of preparation for this motion, and took his receipt. Hitchcock stated in an affidavit he made for the motion, that he never employed any person to defend this suit; that John H. Boyd, of Whitehall, agreed to indemnify and save harmless him (Hitchcock), and the defendant from any costs or expense in the suit, and that he had not then (21st January, 1846), nor had he had the boat "Francis Saltus" in his possession, or in any manner controlled her since the commencement of this suit, yet he may have said that he would take the boat into his possession, believing that the legal effect of discontinuing the suit would oblige him to take back the possession of the boat; that he had executions against Peter Comstock and others amounting to upwards of \$11,800, at the time of the commencement of this suit. John H. Boyd, law partner of David Wilson, the attorney for the defendant, stated that the defendant did not employ him to defend the suit; that Boyd & Wilson were employed to defend the suit by the persons interested in the executions levied upon the boat "Francis Saltus;" that the defendant had no interest whatever in the suit, nor had he anything to do in the managing of the defence, but it was managed wholly by the persons interested in the collection of the executions, in the defendant's hands or his deputy Hitchcock's at the time the boat was replevied. Boyd also stated he had been informed and believed that most of the means furnished to build the boat "Francis Saltus" was furnished by Peter Comstock, the father of the plaintiff; that Peter Comstock managed this suit on the part of the plaintiff, as far as he had any acquaintance with its progress; that Hitchcock, the deputy sheriff, never employed him (Boyd) to defend this suit, nor was he in any way liable for the costs of the defence; on the contrary, he agreed with Hitchcock, to

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Comstock agt. Stowell.

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fully indemnify him and the defendant from all costs, &c., which they might be put to, or be made liable for, in consequence of the suit, and offered to furnish good bail to that effect; to which Hitchcock replied, his agreement was sufficient. Other affidavits were read on the motion, to show that this suit was not defended by the defendant or his deputy Hitchcock, but was defended by and for the creditors in the executions levied, solely. A copy of a bond of indemnity was produced on the motion, to show that Peter Comstock had secured the defendant for the course that Hitchcock, his deputy, had pursued \*in this suit; in returning the executions which [\*55] were levied upon the boat, without a sale being made under them.

On the part of the plaintiff, it appeared from the affidavit of Peter Comstock that he had throughout acted as the agent of the plaintiff, that at the time the suit was commenced, certain executions against him (Peter Comstock) were in the hands of P. C. Hitchcock, the deputy of defendant, on which there was claimed to be due about \$1,600, and no more. By virtue of these executions, the deputy levied on the steamer, "Francis Saltus," which never at any time belonged to him (Peter Comstock), but was owned by the plaintiff in this cause. After the property was replevied, he was unable to procure the requisite securities who would justify in an amount required by statute, and went to defendant to get him to consent to take less amount of security; which defendant declined doing, saying that he (defendant) had nothing to do with the suit; he should give no directions, it was his deputy's business; and he should hold the deputy and his bail responsible for any acts done or omitted, which should render him liable. Defendant said he did not employ the attorney to defend the suit; it was done by his deputy Hitchcock, the suit having been brought for an act of the deputy.

It appeared from the affidavits on the part of the plaintiff, that Hitchcock, the deputy sheriff, informed plaintiff's counsel when the steamer "Francis Saltus" was replevied, it was held by him (Hitchcock) by virtue of three executions; two in fa-

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Comstock agt. Stowell.

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vor of Henry G. Tisdale, and one in favor of John H. Boyd, and by no others, which were issued on judgments against Peter Comstock and others; that the amount due upon all of the executions was from \$1,600 to \$2,000. Hitchcock then said, that inasmuch as he was satisfied that Peter Comstock had no interest in the boat, and as nobody had given him any indemnity for proceeding against the boat on or by virtue of an execution in favor of the Essex County Bank he then held, issued against Peter Comstock and others, and as he knew of no property of Peter Comstock's from which he could collect it, he should return it *nulla bona*; which last execution was returned *nulla bona*, on the 11th of August, 1845. Hitchcock stated in an affidavit made on the part of the plaintiff, that he had, previous to the 9th of July, 1845, advertised the boat under the two Tisdale executions and the Boyd execution, by the directions of John H. Boyd, Esq., from whose office they were issued. Those three, together with the Essex County Bank execution issued for about \$10,000, were the only executions he then held against Peter Comstock. That he told

Boyd he did not feel safe to go on and do anything [56] further under the executions, unless he was \*indemnified; that Boyd did not give any indemnity; that he never advertised the boat upon the Essex County Bank execution. He never did any act or thing under the Essex County Bank execution, so far as related to any levy or sale thereon. In December last, Boyd inquired of him what he was going to do with the executions: he replied he should return them, unless he was indemnified; to which Boyd made no reply. That shortly after this, in December, 1845, he returned the executions *nulla bona*.

Affidavits on the part of the plaintiff were produced, extended in detail, to show that the steamer "Francis Saltus" was built by and owned exclusively by Allen Comstock. It was also alleged on the part of the plaintiff, that the whole proceeding of levying upon the boat, &c., had been instituted by John H. Boyd, who was one of the stockholders of the old steamboat company on Lake Champlain, in order to break up

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Comstock agt. Stowell.

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and dispose of the steamer "Francis Saltus," which was run in opposition to the old line.

C. STEVENS, *defendant's counsel.*

D. WILSON, *defendant's attorney.*

G. STOW, *plaintiff's counsel.*

J. A. MILLARD, *plaintiff's attorney.*

BRONSON, Chief Justice. When the plaintiff's sureties failed to justify, the matter was adjusted between the plaintiff and the deputy Hitchcock, from whose custody the property had been taken by virtue of the writ of replevin. The plaintiff abandoned and discontinued the suit, paid the costs and surrendered the property to the deputy; and the deputy agreed to receive it. The sheriff refused to interfere in the matter in any way, leaving all to the deputy. Neither the sheriff nor the deputy is here for the purpose of making this motion; and I am at a loss to see what right the execution creditors have to make it. But what is quite decisive, all of the executions have either been satisfied or returned *nulla bona*. The sheriff no longer has any right to a return of the property; and, consequently, he has no right to a judgment for the value. If the creditors have been injured, of which, however, there is no evidence, their remedy is against the sheriff. The proof is, that the bank execution, as well as the others, was returned *nulla bona*; but if that be a mistake, I do not see how it could change the result. That execution was never levied upon the boat, and there is nothing to show that the bank was willing to take the hazard of selling the boat as the property of *Peter Comstock*. On the contrary, Mr. Simmons, the attorney, said the bank did not intend to proceed against the boat. I see no foundation for the motion. Motion denied with costs.

[\*57] \*THOMAS VERMILYEA agt. THEOPHILUS BEATTY and wife, executrix, &c.

A plea of *ne unques executor* will be allowed, after the plea of the general issue has been pleaded by a defendant executor, where it appears that the testator has not and never had any assets within this state.

*February Term, 1846.*

MOTION by defendants for leave to amend their plea filed, by adding to the plea of the general issue, the plea of *ne unques executor*.

It appeared from defendant's papers, that Ellen Adair Beatty, the wife of the defendant, Theophilus Beatty, was formerly the wife of Joseph M. White, deceased, of the state of Florida. White, by his last will and testament, appointed Ellen Adair Beatty his sole executrix; she had the will duly proved in Florida, and letters testamentary were granted to her by the court in Florida; but the will was never proved and no letters testamentary were ever issued in the state of New-York to the executrix. The defendants resided in Florida, and there were not and never had been any assets within the state of New-York belonging to White. Reasons were assigned by the defendants, why they had not until about 26th of September last communicated to their counsel at New-York these facts; the plea of the general issue was filed on the 9th of September last. This motion was made at last December special term, and denied without prejudice, not on the merits.

In opposition to the motion, it appeared from the affidavit of the plaintiff, that he had been informed, and believed that the executrix had not filed any inventory or accounts of White's estate or of her proceedings as executrix, nor paid any of the testator's debts, but, soon after she obtained letters testamentary in Florida, she raised \$6,000 on White's property and effects, and transmitted the amount to a mercantile firm in the city of New-York, and that she afterwards came to the city of New-York and received that amount of money, and subsequently expended it for her own use; and that he was further

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Scott agt. Hunt.

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informed and believed, that the executrix or her husband Beatty, on her behalf and by her authority, had received in the city of New-York other moneys to an amount exceeding the sum of \$4,000, being the proceeds of property of White.

G. R. J. BOWDOIN, *defendants' counsel.*

G. M. OGDEN, *defendants' attorney.*

A. TABER, *plaintiff's counsel.*

A. S. GARR, *plaintiff's attorney.*

BRONSON, Chief Justice. The oath, that there are not and never have been any assets within this state, is answered by nothing but *information and belief*, what will be the effect of the new plea, we are not now called upon to consider; I think it right that the defendants should be allowed to amend in the way proposed. Motion granted on payment of \$7 costs of opposing.

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\*WILLIAM SCOTT agt. WALTER HUNT. [\*58]

A promise or agreement to accept a less sum in satisfaction of a greater one, without a release, is void for the want of consideration. (*Seymour agt. Minburn*, 17 John. 169.)

*February Term, 1846.*

MOTION by defendant to vacate judgment and execution, or for an order declaring judgment satisfied.

The plaintiff recovered a judgment against the defendant, in June, 1845, for \$2,324.79 damages, and \$40.92 costs, by default. The recovery against the defendant was had as guarantor of a certain written agreement made between one Amos Hunt and the plaintiff, of which the defendant was the guarantor for the faithful performance on the part of Amos Hunt. Execution was issued in September last. It appeared from defendant's papers, that after the rendition of the judgment, and in September last, an interview took place between the plaintiff and defendant, and Amos Hunt, for the purpose of a compromise, and the plaintiff agreed to receive from the de-

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Scott agt. Hunt.

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fendant the advances he had made on the contract, costs and interest, in full satisfaction of the judgment, provided the defendant would pay the same in a specified time and manner. The affidavit of Amos Hunt stated that all the moneys advanced by the plaintiff, upon the original contract, was \$1,004; he also stated that the defendant had paid to the plaintiff, in pursuance of and according to their agreement of compromise, payments which amounted, in the aggregate, to a sum exceeding the advances, costs and interest, to wit: \$1,000 in cash, pair of horses, which were agreed upon at \$200, and paid the costs of plaintiff's attorney and sheriff's fees, for all of which payments receipts were produced. On application by defendant for a discharge of the judgment, the plaintiff claimed there was \$700 still due him.

On the part of the plaintiff, it appeared from his account stated, that he had charged the defendant, cash as advanced at different times with interest, \$2,006.32, and had given defendant credit for \$1,200, as stated by defendant's papers, leaving a balance due plaintiff of \$806.32; in the amount charged to defendant, was an item of \$500, for the commission of plaintiff's agent, who made the agreement on the part of plaintiff, and attended to the business for the plaintiff, and \$40 costs paid by plaintiff. Plaintiff stated that the account rendered was correct, and that the amount to be paid on the compromise had not at the time of entering into it been determined; he always insisted, when talking the matter over with the defendant and Amos Hunt, that he must be paid the advances made and to be made by him, the interest thereon, the expenses [\*59] he had been put to, and the expenses he would have to pay, which included the commissions of his agent.

A. L. LINN, *defendant's counsel and attorney.*

N. HILL, JR., *plaintiff's counsel.*

C. S. GRINNELL, *plaintiff's attorney.*

BRONSON, Chief Justice. The plaintiff recovered \$2,324.79, besides costs; and it is not alleged that he recovered more than



The People agt. The Judges of the court of common pleas of Jefferson county.

was justly due. There would be no use, therefore, in allowing the defendant to plead and have a trial. He relies on a promise by the plaintiff, to accept less than the amount recovered in satisfaction of the debt; and, having paid \$1,200 and the costs, insists that he has performed the agreement. The plaintiff is still willing to abide by the promise, but insists that, according to its terms, the sum of \$700 remains due him. And so the parties are at issue in their papers as to how much was to be paid. If the defendant could prevail on the question of fact, he is then met by the difficulty that a promise or agreement to accept a less sum in satisfaction of a greater one, without a release, is void for the want of consideration. (*Seymour agt. Minturn*, 17 John. 169.) All we can do for the defendant is, to direct satisfaction of the judgment to be acknowledged on payment of the sum of \$700, which the plaintiff still offers to accept.

Rule accordingly.

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THE PEOPLE *ex rel.* DANIEL GRIFFIN agt. THE JUDGES OF  
THE COURT OF COMMON PLEAS OF THE COUNTY OF JEFF-  
ERSON.

The court will not interfere by mandamus to control the practice and judgments of other courts. They have no such jurisdiction.

*February Term, 1846.*

MOTION on notice by relator for a mandamus to require the judges to vacate an order requiring relator to file security for costs in a cause.

This was a motion for a mandamus to compel the court of common pleas of Jefferson county to vacate an order made by them requiring the relator to file security for costs, in a suit commenced by him in a justice's court, and appealed by the defendant to the court of common pleas of Jefferson county. That court have adopted a general rule, requiring a party when plaintiff, in cases of certiorari and appeal in the court

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The People agt. Sage.

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below, if a non-resident of the county, to file security for costs. In this case, Griffin sued Ingalls in justice's court and obtained judgment; Ingalls appealed, and then obtained an order to compel Griffin to file security for costs. The affidavit showed that the granting of the order was opposed upon the ground that the court of common pleas had no authority to [\*60] require security for costs to be filed in cases of appeal.

It was insisted by relator's counsel, that the common pleas have power to hear and determine appeals from justices' courts, in the cases and in the manner prescribed by law. 2 R. S. 135, § 2, 2d edition, article 11, p. 186, treats "of appeals to the court of common pleas," of cases when appeals may be brought, and the manner of hearing and determining them; but there was no authority conferred by these provisions upon the courts of common pleas to require security for costs to be filed. There was no power or authority conferred by law upon the common pleas to adopt the general rule they have made in this case, and any order made under it, requiring a plaintiff appellee to file security, must be void. It was an act of legislation by the court.

M. T. REYNOLDS, *relator's counsel.*

A. FORD, *relator's attorney.*

D. BURWELL, *defendants' counsel.*

J. F. STARBUCK, *defendants' attorney.*

BRONSON, Chief Justice. This case comes within the settled principle that this court will not interfere by mandamus to control the practice or judgments of other courts. We have no such jurisdiction. Motion denied.

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THE PEOPLE *ex rel.* ABRAHAM D. VAN VALKENBURGH agt.  
ABEL SAGE *et al.*, Commissioners of Highways, &c.

A rule entered, granting an alternative mandamus, may properly be entitled in the cause. Affidavits, upon which an application for an alternative mandamus is founded, should not be entitled.

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The People agt. Manley.

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*February Term, 1846.*

MOTION by defendants to quash an alternative mandamus, and the rule granting it.

This motion was made to vacate the rule authorizing a mandamus to issue, entered on the 11th of December last, and also to quash or supersede the writ, on the ground that the rule was improperly entitled, and was unauthorized by the court. The rule was entered entitled as above. It was insisted by defendant's counsel on the argument, that a rule for a mandamus could not properly be entitled in the cause; the entitling should have been, "In the matter of, &c., for a mandamus, &c."

The chief justice held that the rule was properly entitled; he said the *affidavits* for an application for a mandamus should not be entitled at all, but after the order was granted by the court, the rule might properly be entitled in the suit. The defendants' counsel urged, on the merits, that the rule was entered for more than was granted by the court.

\*J. H. REYNOLDS, *defendants' counsel.*

[\*61]

WM. H. TOBEY, *defendants' attorney.*

JOHN KOON, *relator's counsel and attorney.*

BRONSON, Chief Justice. The affidavits are conflicting as to what was said at the time the mandamus was ordered; and on looking at the whole case, I see no sufficient ground for granting the motion.

Motion denied.

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THE PEOPLE *ex rel.* MARY MANLEY agt. JAMES MANLEY.

A motion for a *habeas corpus*, for the purpose of awarding the custody and care of children to one parent, is addressed to the discretion of the court. (2 R. S. 148, §§ 1, 3; *The People agt. Chegaray*, 18 Wend. 637.) A full disclosure of all the facts and circumstances in relation to the ability of both parents will be required, before allowing the writ to bring the children into court.

*February Term, 1846.*

MOTION by Mary Manley for a writ of *habeas corpus*. The

petition of Mary Manley showed that she was the wife of James Manley; she and her husband were living in a state of separation without being divorced; she was married to him many years since; there were two minor children of such marriage living, to wit: Beza Manley, aged 12 years, and John Manley, aged 4 years; her husband left her in the fall of 1843, and took the two children and a maid servant who lived with them, and most of the furniture and property in the house; and from that time she had not seen or directly heard from him; she was informed that her husband was then living with the maid servant as his wife, who had had one child by him; that her two children were living with them, and they received much severe and cruel treatment from the maid servant; that they were exposed to injury from the examples of vice constantly before them, the children desired to return to their mother, and she was exceedingly anxious to have them under her care and provide for their wants, and furnish them with support and education. She, therefore, prayed that the writ of *habeas corpus* provided by statute in such cases might be issued, directing that the children might be brought into this court, that the matters might be examined, and that the care and custody of the children might be awarded to her.

J. A. SPENCER, *counsel*.

O. S. WILLIAMS, *attorney*.

BRONSON, Chief Justice. The motion is addressed to the discretion of the court (2 R. S. 148, §§ 1—3; *The People agt. Chegaray*, 18 Wend. 687); and the case ought to be more fully stated. We ought to know something about the [\*62] ability of the mother to provide for the children; \*and also about the pecuniary condition of the father. It is quite possible that the father would not be able to obey the writ, by bringing the children into court, should the motion be granted; and it is also possible that the mother could not provide for the maintenance and education of the children, should they be committed to her charge. We must have a more full statement of facts. Motion denied.

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Mabbett agt. Kelly.

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HENRY F. MABBETT and WM. MULLIGAN agt. WM. A. KELLY  
and JOHN C. KELLY.

Where a judgment is entered for the penalty in a *bail bond* suit, the damages should be assessed in the *original action*. (2 R. S. 358, §§ 12—14.)

If the damages are assessed in the bail bond suit, it is a void proceeding, of which the defendant in the bail bond suit is not affected, unless *execution is issued* for the damages assessed.

Taxing costs without notice is a ground for asking a re-taxation; but not for setting aside the judgment.

*February Term, 1846.*

MOTION by defendant Wm. A. Kelly, to set aside the writ of inquiry, judgment record and other subsequent proceedings in this cause, for irregularity.

This suit was commenced upon a bail bond executed by the defendants to H. Wetherby, Esq., sheriff of Onondaga, in the penalty of \$1,000, conditioned that John C. Kelly should appear in an action of trover commenced by the plaintiffs against John C. Kelly, by capias issued out of the court of common pleas of Onondaga, by putting in special bail in twenty days after the return day of the writ, &c. The defendants appeared in this action and demurred to the declaration, and judgment was rendered in favor of the plaintiffs on the demurrer as frivolous, at the last October term of this court. On the 7th of November last, a writ of inquiry of plaintiffs' damages was executed on notice to defendants' attorneys *in this suit*. On the 24th of November writ of inquiry was filed, and on the 29th of November judgment was perfected. The papers for the motion stated that *no declaration had been filed in the original action*, that the writ of inquiry was in the suit on the *bail bond*; also that *no notice of taxation of costs was served*. One of defendants' attorneys stated that he appeared on the execution of the writ of inquiry solely, for the purpose of objecting to the regularity of the proceedings; that he objected to plaintiffs' proceedings as irregular; that he did not appear for the purpose of cross-examining plaintiffs' witnesses, although he asked some questions of one of the witnesses. Plaintiffs' pa-

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Mabbett agt. Kelly.

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pers stated that one of defendants' attorneys did appear [\*63] and cross-examine a witness. \*Defendant moved on the ground that the writ of inquiry should have been issued in the original action in the Onondaga common pleas; also on the ground that damages could not be assessed, until a declaration had been filed in the original action in the common pleas, and on the ground that no notice of taxation of costs had ever been given in the cause.

Plaintiff claimed that the judgment, entered for the penalty on the demurrer as frivolous, was regular; plaintiff had a right to enter up that judgment when it was rendered, before any damages were assessed; that the writ of inquiry should have been executed in the original action, but it was a mere *irregularity*, which it was insisted defendant had waived by appearing and cross-examining a witness. If the writ of inquiry was a *nullity*, then there was no necessity to move to set it aside, until an *execution* had been issued for the damages found by it. But no execution had been issued. The plaintiff might yet file his declaration and assess damages in the *original action*. As to the notice of taxation of costs, it was insisted it was not a ground for disturbing the judgment, but only for a motion for *re-taxation*, which the defendants did not ask.

MR. COMSTOCK, *defendants' counsel*.

NOXON & Co., *defendants' attorneys*.

A. TABER, *plaintiffs' counsel*.

FORBES & SHELDON, *plaintiffs' attorneys*.

BRONSON, Chief Justice. Judgment has been properly entered on the bail bond for the penalty. But the plaintiffs have made a mistake in executing a writ of inquiry of damages in the bail bond action. (2 R. S. 358, §§ 12, 14.) But this void proceeding has not injured the defendants. The plaintiffs have not acted upon it; no execution has been issued on the judgment. Before that is done the plaintiffs will probably assess damages in the original action. If they do not, it will be time enough then to move. At present, there

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Thresher agt. Keteltas.

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is no irregularity which has injured or can affect the defendants.

Taxing costs without notice is a ground for asking a re-taxation; but not for setting aside the judgment. Motion denied with costs.

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In the matter of MINARD S. THRESHER agt. EUGENE  
KETELTAS.

In an affidavit made for a dispossessory summons to remove a tenant under the statute: it was held, that the landlord describing himself "as trustee of the estate of A. B., deceased," that he "now owns said premises and holds said lease as sole trustee of said estate," was a sufficient description as landlord of the premises.

*February Term, 1846.*

MOTION *ex parte* on behalf of Thresher for a certiorari.

It appeared \*that Thresher had been dispossessed [\*64] of certain premises in the city of New-York, by proceedings under a summons issued by Wm. G. Sterling, Esq., an assistant justice of the city of New-York, upon an affidavit made by Keteltas. It was stated as a ground of certiorari, that the affidavit produced before the assistant justice did not show sufficiently that Keteltas was landlord of the premises. The affidavit made by Keteltas, before the justice, stated that part in relation to his being landlord as follows: "being duly sworn says, that Minard S. Thresher, *as tenant*, is justly indebted unto deponent, *as trustee of the estate of John Gardner, deceased*, in the sum of," &c.; "that deponent, and one Thomas S. McCarty, as trustees of the estate of John Gardner, deceased (without, however, being described as such in the agreement), on the 23rd day of November, 1836, leased said premises to John H. Gardner, for the term of nine years, from May 1st, 1837; that said McCarty has since deceased, and deponent *now owns said premises and holds said lease as sole trustee of said estate*," &c.

R. N. MORRISON, *counsel and attorney.*

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Barstow agt. Thorne.

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BRONSON, Chief Justice. It sufficiently appears, from the affidavit, that Keteltas was the landlord. Motion for certiorari denied.

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DAVID F. BARSTOW agt. JULIUS C. THORNE and ISAAC H. STORM.

Where an under sheriff levied upon and sold defendants' personal property upon a *junior* judgment execution and *levy*, and paid over the money collected upon the execution to plaintiff's attorney, disregarding a prior judgment execution and *levy* by a deputy sheriff, as intended to hinder and delay other creditors; it was *held* on motion by plaintiff in the oldest judgment and *levy*, to compel the sheriff to pay over the amount he had collected on the oldest execution; that the plaintiff had his remedy against the sheriff if he had been injured; and the motion was denied with costs.

*February Term, 1846.*

MOTION by plaintiff that the sheriff of Oneida return the execution in this cause, and pay over to the plaintiff's attorney the whole amount of money made from the sale of defendants' property.

An execution was issued in this cause and put into the hands of Lent, deputy of the sheriff of Oneida, on the 31st of December, 1844, for \$1,181.05 and interest from 10th February, 1844. On the 18th of February, 1845, the deputy Lent took an inventory of the personal property of the defendants, on which he levied, consisting of dry goods, crockery, hardware, &c., being the remnant of a store of goods. Lent took a receipt from a responsible freeholder for the delivery of the property.

Lent advertised the property for sale on the 28th of [\*65] February, to be sold on the 6th \*March, at 10 o'clock, A.M., at the store of defendants. Plaintiff's attorney consented to an adjournment of the sale to the 17th of March, for the reason that the defendants alleged that they expected a man from Pennsylvania within a short time, to let them have funds to pay off the judgment. On the 17th of March defendants again desired a postponement, as the individual from



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Barstow agt. Thorne.

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Pennsylvania had not arrived; it was stated by them that a letter had been received from him, that he expected to be there in a short time. Plaintiff's attorney consented that the sale might be postponed to the 7th of April; defendants stated that if the individual did not arrive within a week, one of them would go there in order to obtain the money. The deputy Lent stated that the amount of goods levied upon was not near sufficient to satisfy the execution. About the 1st of April, John S. Ray, under sheriff of Oneida, informed Lent, that he (Ray) had levied upon the same goods which Lent had previously levied upon, and had advertised to sell on the 5th of April. Lent informed Ray he had previously levied, and was to sell on the 7th of April. On the 5th of April Ray sold the goods levied upon by Lent, Lent being present and forbidding the sale. It was alleged in plaintiff's papers, that the sale of the property was postponed, solely for the reasons stated, with an expectation that defendants would realize the money and pay the judgment, without a sale of their property, and was not done to hinder or delay creditors.

It appeared from the papers in opposition to the motion, that on the 5th of February, 1845, an execution was issued out of this court on a judgment rendered on the 4th January, in favor of Isaac T. Storm, Charles Storm and Isaac I. Cooper, plaintiffs, against the defendants in this cause, for the sum of \$241.45, and delivered to Ray, under sheriff of Oneida, who in March levied on all the property of defendants he could find, including the remnant of a store of goods. On the 5th of April following, he sold the property and received on such sale \$112.47, besides expenses, which amount he paid over to plaintiff's attorney in the execution received by him; the amount was endorsed on the execution and the execution was returned and filed. Ray denied that Johnson, plaintiff's attorney in this cause, ever requested him to pay over the money he had received upon the execution in this cause, before he had paid it over as stated.

Ray also stated, that the defendants, from the winter of 1844 up to the time of the sale, were engaged in the mer-

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Barstow agt. Thorne.

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cantile business, at Annsville, in the county of Oneida, and during the spring, summer and fall of \*1844 they had a large amount of goods, and during all that time he was informed and believed defendants had no other property liable to execution, except such as was in and about their store; also that during all of the year 1844, and up to the time he levied on the goods of defendants, they were engaged in carrying on their store and disposing of their goods and property like other merchants, as sole and exclusive owners thereof, without any apparent hindrance or molestation whatever; that, during the summer and fall of 1844, he had other executions against the defendants, that when he went to collect them, he was always met by an execution issued in this case by B. P. Johnson, attorney, and the claim that such execution was the first lien on the property of the defendants, and that it was large enough to consume all their property.

Ray further stated that it appeared from the law register of B. P. Johnson, Esq., that on the 18th March, 1844, an execution was issued in this cause and delivered to M. L. Kenyon, a deputy sheriff, and that again in the month of August, another execution was issued and delivered to Kenyon, the first one having been returned as stated in the register. Ray stated that when he received the execution as stated by him the defendants had disposed of nearly all of their property, and it was still claimed by defendants that Ray could not take the property, because it was subject to an execution in this cause; still he thought executions in this cause had been used long enough to keep off other creditors, and he went on and levied and sold.

Ray also stated that after he had levied, Lent, the deputy sheriff, showed him the execution in this cause (issued by Johnson on the 31st Dec., 1845), in presence of O. B. Matteson, and upon inspection of it, it plainly appeared that the teste of the execution had been altered, by striking out the words "Academy in Utica, the first Monday in July," and inserting in their stead the words "2nd Monday in October,

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Keefer agt. Keefer.

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at the Court House in the city of Rochester," and that Lent informed him and Matteson, that after he (Ray) had levied upon defendants' property, Johnson called on Lent and took the execution and altered it in teste thereof as stated; and that Lent informed them he would swear to the fact if necessary. Lent had since left this part of the country, and his affidavit could not be procured. Ray also stated that he had seen Johnson's law register, in which this cause was entered, that from the entries therein, it appeared that the execution which was delivered to Lent had been altered. Ray also stated that he had made search, and the execution in this cause could not be found returned. The facts stated by Ray were substantially corroborated by other affidavits.

\*JAMES EDWARDS, *plaintiff's counsel.*

[\*67]

B. P. JOHNSON, *plaintiff's attorney.*

C. H. DOOLITTLE, *counsel apposed.*

MATTESON & DOOLITTLE, *attorneys apposed.*

BRONSON, Chief Justice. On looking into the papers, I am confirmed in what was said on the argument. The sheriff has paid over the money on the junior execution, and the plaintiff, Barstow, if he has been injured, has a complete remedy by action; he can sue for the money, or rule the sheriff to return his execution, and then sue for a false return.

Motion denied, with \$7 costs.

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LEWIS KEEFER, defendant in error, agt. HENRY I. KEEFER,  
plaintiff in error.

A question of the statute of limitations to a writ of error can be taken advantage of only by plea. (11 Wend. 522.)

Whether a bill of exceptions has been signed by enough judges, is a question which does not arise on motion. If there is not a legal bill of exceptions, the plaintiff in error can only rely upon errors in the judgment record.

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Keefer agt. Keefer.

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Where a defendant in error moves to set aside a writ of error and bill of exceptions for irregularity, in not noticing the bill of exceptions for settlement within the time required by the rules of court, he will be defeated; where the plaintiff in error shows that the attorney for defendant in error consented or did not object to go before a judge for settlement, after the time had expired.

*February Term, 1846.*

MOTION by defendant in error to set aside writ of error, bill of exceptions and subsequent proceedings in this cause, for irregularity.

On the part of the defendant in error, it appeared that this cause originated in a justice's court, commenced by Lewis Keefer against Henry I. Keefer; Lewis Keefer obtained judgment over \$25. Henry I. Keefer appealed to the Dutchess common pleas. On the 26th September, 1843, the cause having been brought on for trial, the court non-suited the plaintiff, Lewis Keefer, and a rule for judgment of non-suit was then entered. On the 23d November, 1843, the attorney for Lewis Keefer served upon the attorney for Henry I. Keefer a copy bill of exceptions in the cause; a written stipulation having been given, giving sixty days to serve the exceptions, and sixty days were also given to propose amendments to the bill; within sixty days amendments were prepared, and on the 18th January, 1844, were served on A. L. Pinney, Esq., attorney for Lewis Keefer, by leaving them with his wife at his place of residence, he being then absent from home and no one being in his office; another copy amendments was enclosed and addressed to A. L. Pinney, Esq., at Albany, and postage paid, where A. L. Pinney was residing during that winter. On the 28th July, 1845, a notice was served by Pinney on W. Eno, attorney for Henry [\*68] I. Keefer, that the bill of exceptions would be settled before Judge WOODWORTH, before whom the cause was tried on the 4th of August, 1845. On the 4th of June, 1845, the record of judgment in the cause was filed in the Dutchess county clerk's office. On the 15th October, 1845, Pinney served notice on Eno, that a writ of error had been brought to remove the judgment and proceedings into this court;

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Keefer agt. Keefer.

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which writ was tested in July, and returnable in October, 1845; also at the same time notice of bail, &c., were served. On the 13th December, 1845, the writ of error and return were filed.

Eno, attorney for defendant in error, alleged that the bill of exceptions was settled under the rules of the Dutchess common pleas, according to the amendment served, which provided, that if the party omitted, within four days thereafter, to notify an appearance before the judge, after the other party had proposed amendments, the opposite party should be deemed to have agreed to the amendments as proposed. He also alleged he had not directly or indirectly consented that the time for settling the bill of exceptions should be any different from that prescribed by the rules of the court, or that any notice of appearance before the judge, to settle the same, should be waived; that he did not attend before Judge WOODWORTH at the time noticed, nor any other time, to settle the bill of exceptions, and had never agreed to settle it before Judge WOODWORTH. He also alleged that the amendments served were not allowed and incorporated in the bill of exceptions, except one amendment, the most material being omitted. Defendant in error made the following points:

1st. The writ of error was not brought in the two years prescribed by the statute (2 R. S. 493, § 21; 11 *Wend.* 522); and insisted it was not brought till perfected and filed in the clerk's office.

2d. The bill of exceptions was irregular in being signed by only one judge (13 *John.* 321); remedy, to set aside on motion. (10 *Wend.* 255).

3d. The bill of exceptions was made wrong, the amendments should have been adopted (*Rule* 20); Dutchess common pleas.

4th. The certificate of the judge was before record filed (*Sess. Laws*, 1836, 794).

It appeared on the part of the plaintiff in error, that Pinney informed Eno, about the time the bill of exceptions was served, that he had left his papers and the charge of this cause in the

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Keefer agt. Keefer.

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hands of Walter Reynolds, Esq. (Reynolds and Eno residing at the same place), as he expected to be absent from home and would not be able to attend to it, and service of papers could not be made on Reynolds. Reynolds made out [\*69] the bill of \*exceptions and served it. In December, 1843, he (Pinney) left home for Albany, and remained there till May, 1844. Some time after the June term, 1844, of the Dutchess common pleas, he found in his office a copy of amendments to the bill of exceptions proposed by Eno; that soon thereafter, he spoke to Eno about settling the exceptions, and asked him if they should go down before Judge JACKSON, first judge of Dutchess county, and settle them. Eno replied that he supposed he could compel him (Pinney) to take his amendments as proposed; he (Pinney) told him he thought not. It was then understood between them, that they should wait until the September term of the common pleas, when they would see Judge JACKSON at court, and then settle them. At the September term of the court, Pinney spoke to Eno about settling the exceptions; Eno said he had not got his papers in the cause with him; Pinney asked Eno what was to be done about it; Eno said he must either get them before court was over, or it would have to go off until the next term of the court. Pinney heard no more from it at that term. At the February term, 1845, Judge JACKSON did not attend court; between that time and the next June term, Pinney spoke to Eno about going to Fishkill before Judge JACKSON, and settling the exceptions, as Judge JACKSON's term of judge had expired, and he would not attend court again. Eno replied that he believed Judge JACKSON did not try the cause, it was tried before Judge WOODWORTH and the bill would have to be settled by him; Pinney told Eno to fetch his papers at the next June term (1845), and Judge WOODWORTH would then settle the exceptions. At the June term, Pinney spoke to Eno in relation to going before Judge WOODWORTH to settle the exceptions; and Eno replied, "Oh, let that matter go;" Pinney answered he could not. Pinney then had suspicions that Eno did not intend to settle the ex-

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Keefer agt. Keefer.

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ceptions; and he thereupon served the notice for settlement on the 28th July, 1845, for the 4th of August following; when the bill of exceptions was settled and signed by Judge WOODWORTH; such of the amendments proposed by Eno was adopted by the judge, as he said was correct, being a part of several of the amendments which were incorporated in the bill of exceptions.

It was stated that Walter Reynolds, Esq., died in January, 1844. Pinney stated that he never received any amendments while in Albany, and no amendments or notice of amendments, except those found in his office, as before stated; he was not aware that the costs had been taxed, or record filed until a few days before the last Monday in September, 1845; he never had been served with a bill of costs and notice of taxation.

C. STEVENS, *counsel moving.*

[\*70]

WM. ENO, *attorney for defendant in error.*

R. W. PECKHAM, *counsel opposed.*

A. L. PINNEY, *attorney for plaintiff in error.*

BRONSON, Chief Justice. The affidavits and notice of motion seem to point at nothing beyond a supposed irregularity in settling the bill of exceptions, and as to that, the motion is sufficiently answered in the opposing papers. If it was intended to make a question, whether the statute of limitations had not run upon the writ of error, that should have been done by plea. (11 *Wend.* 522.) Whether the bill of exceptions has been signed by enough judges, is a question which does not arise on motion. If there is not a legal bill of exceptions, the plaintiff in error can only rely upon errors in the judgment record. As to the judge's certificate, I am unable to see what objection the defendant in error intended to make; of course the plaintiff in error could not know what he was required to answer. Motion denied.

• CLARK MASON agt. LEWIS MOORE *et al.*

An affidavit of merits for a motion, stating the defendant has a *defence upon the merits to the plaintiff's demand on the promissory note, &c.*, is defective, and will be held bad.

*February Term, 1846.*

MOTION by defendant to change the venue.

This motion was denied on a defect in defendant's affidavit; that part of the affidavit which swore to merits, and the part objected to, read as follows: "that the said defendants have a good and substantial *defence upon the merits to the plaintiff's demand on the promissory note*, on which this action is brought, as this deponent is advised by their said counsel, &c."

W. J. CORNWELL, *defendants' counsel.*

J. S. JENKINS, *defendants' attorney.*

R. W. PECKHAM, *plaintiff's counsel.*

H. K. JEROME, *plaintiff's attorney.*

BRONSON, Chief Justice. Denied the motion with \$7 costs, for the defect mentioned in the affidavit.



JOHN C. PECK, plaintiff in error, agt. ABRAHAM WITBECK,  
defendant in error.

Papers for a motion by defendant in error to set aside a common law certiorari, directed to a supreme court commissioner, should be entitled A. B., defendant in error, agt. *The People ex. rel. C. D.*, plaintiff in error.

*February Term, 1846.*

MOTION by defendant in error to set aside a common law certiorari.

On the 5th June, 1845, a rule was granted by this court on the application of Peck, plaintiff in error, allowing a common



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Woods agt. Hartshorn.

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law certiorari to issue, directed to Isaac Pruyn, Esq., supreme court commissioner, to remove \*proceedings [\*71] had before him, on an application of Witbeck against Peck, under the act to abolish imprisonment for debt and to punish fraudulent debtors, passed April 26, 1831. It was objected by counsel for Peck, that the papers for this motion were not properly entitled (being entitled as above, except that the title was reversed); they should have been entitled, *Witbeck ads. The People ex rel. Peck, &c.* It was a matter before a commissioner.

J. H. REYNOLDS, *defendant's counsel.*

R. V. GROAT, *defendant's attorney.*

P. CAGGER, *plaintiff's counsel.*

M. SANFORD, *plaintiff's attorney.*

BRONSON, Chief Justice. Sustained the objection, and denied the motion with \$7 costs.

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WM. WOODS, general guardian, &c., agt. DAVID HARTSHORN.

An attorney is not bound to take papers from the post office, served on him, where they are directed to another post office and are forwarded to the post office where the attorney resides, *charged with postage.*

*February Term, 1846.*

MOTION by defendant for judgment as in case of non-suit.

Defendant moved on the usual affidavit. Plaintiff's attorney opposed, on the ground that the cause was not at issue; he stated that the name of the plaintiff's attorney and residence, to wit, "Auburn, N. Y.," was printed on the copy declaration served in this cause; that he had never received any plea or notice in the cause, but had been informed that papers of some kind in the cause were received in the Skaneateles post office, directed to him and charged with postage, but he had never seen or received them.

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Brown agt. Vedder.

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R. H. TYLER, *defendants' attorney.*

M. T. REYNOLDS, *plaintiffs' counsel.*

G. UNDERWOOD, *plaintiffs' attorney.*

BRONSON, Chief Justice. Denied the motion with costs, without prejudice, on the ground that there was postage charged on the letter to plaintiff's attorney, from Skaneateles to Auburn.

Three other causes, same plaintiffs and different defendants, decided on the same ground.

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LUCINA BROWN agt. ABRAHAM VEDDER.

Where defendant's attorney, in a letter to plaintiff's attorneys, stated "that if it would be more convenient to them to try the cause at any other time than November, he would agree to put over," and afterwards moved for judgment as in case of non-suit for not noticing and trying the cause at November circuit. *Held*, that he was precluded on the motion, by his agreement in the letter.

*February Term, 1846.*

MOTION by defendant for judgment as in case of non-suit.

[\*72] Defendant \*moved on the usual affidavit for not noticing and bringing cause to trial at November circuit, 1845, at Johnstown, Fulton county. Plaintiff's attorneys produced a letter received from defendant's attorney in answer to one, requesting defendant's attorney to admit certain facts, &c.; at the bottom of the letter was written as follows: "P. S. If it will be more convenient to you to try the cause at any other time than November, I will agree to put over. H. L." Plaintiff's attorneys stated that there was time enough, after the receipt of the letter, to have noticed the cause for November circuit, and they should have done so, but for the information stated as above.

D. BURWELL, *defendant's counsel.*

H. LINK *defendant's attorney.*

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Crosby agt. Taylor.

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MR. COMSTOCK, *plaintiff's counsel.*NOXON & Co., *plaintiff's attorneys.*

BRONSON, Chief Justice. Denied the motion, costs to abide the event, on the agreement contained in the letter.

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STEPHEN CROSBY agt. ALBERT TAYLOR.

Where a motion is made for judgment, as in case of non-suit, and the plaintiff shows that no cause of as young an issue was tried at the circuit, the motion will be denied, *costs to abide the event.* (10 Wend. 592.)

*February Term, 1846.*

MOTION by defendant for judgment, as in case of non-suit.

The plaintiff noticed the cause for trial at November circuit, 1845, in Montgomery. On the 8d November, defendant's attorney received from plaintiff's attorney notice of countermand of his notice of trial. Defendant's attorney refused to receive the notice of countermand, unless his costs, which he had incurred under the notice of trial, were paid. Plaintiff showed that at the same time notice of countermand was served on defendant's attorney, he also served a stipulation to try the cause at the next May circuit in Montgomery. Plaintiff also showed, that no issue of a later date than the issue in this cause was tried at the November circuit, and that if this cause had been put upon the calendar, it could not have been tried at the November circuit: it would not have been reached.

R. H. TYLER, *defendant's attorney.*P. CAGGER, *plaintiff's counsel.*J. WENDELL, *plaintiff's attorney.*

BRONSON, Chief Justice. Denied the motion without prejudice, *the costs to abide the event.* This follows the case in 10 Wend. 592, as to the costs; the attorney made the motion in good faith, no doubt.

[\*78] \*CHARLES COOK ag JOHN FINCH.

Where default is entered, and defendant's attorney, some twenty days after he is informed of it, tenders a plea, &c., and offers to pay all costs, and the plaintiff's attorney refuses to accept of the tender, on the ground of delay, and a motion is made by defendant's attorney to set aside the default, &c., the motion will be granted on payment of all costs, *except the costs of the motion*, which would have been allowed to defendant, if he had not delayed in making tender.

*February Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings.

Narr served November 25, 1845. November 29, defendant's attorney served affidavit and notice of motion to change the venue and copy order staying proceedings on plaintiff's attorney (not being aware of the 95th rule, he supposed the order to stay enlarged the time to plead). On the 18th December, default was entered. On the 26th December, plaintiff's attorney received a plea of the general issue. On the same day he returned it to defendant's attorney, stating that the default had been entered, and refused to accept it; immediately defendant's attorney wrote to plaintiff's attorney, and offered to pay his costs of default and subsequent proceedings, if he would open the default, to which he received no answer. On the 19th January, 1846, defendant's attorney tendered plaintiff's attorney a plea of affidavit of merits and affidavit of excuse for not having pleaded in time, and offered to pay costs of default and subsequent proceedings, which plaintiff's attorney refused to accept, for the reason that, under rule, 20, defendant's attorney was required to make the tender as soon as he knew the default was entered.

E. VAN BUREN, *defendant's attorney.*

L. N. B. VANDERLIP, *plaintiff's attorney.*

BRONSON, Chief Justice. Granted the motion on payment of costs, *except the costs of this motion.*

Costs of the motion were not allowed, because the plaintiff's

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Hunt agt. Northrop.

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attorney refused to accept the costs tendered with the plea, &c. Costs of the motion would have been allowed to defendant, if he had not delayed some twenty days in his tender.

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WILLIAM A. HUNT agt. THOMPSON NORTHROP.

A motion made for an attachment, to compel a party in interest to pay costs, will be denied with costs, where the party against whom the motion is made denies that he has any interest in the demand upon which the suit was brought.

*February Term, 1846.*

MOTION by defendant for an attachment against a plaintiff in interest, to collect costs of judgment of non-pros.

This suit was commenced in \*January, 1845, on a [\*74] promissory note, made by the defendant, payable to Robert A. Robinson: note dated April 26, 1841. The defendant pleaded his bankrupt discharge, &c. Plaintiff's attorney then proposed to defendant's attorney to discontinue without costs, which was refused; and defendant's attorney subsequently entered judgment of non pros, and issued execution, which was returned unsatisfied. Defendant alleged that Robert A. Robinson, the payee of the note, was the party in interest, that Hunt was nominal plaintiff merely.

Robert A. Robinson stated that, in the month of December, 1844, he transferred the note in suit to Asa Robinson, for a valuable consideration, since which time he had had no interest in it, or the money due upon it; that no part of the note had at any time been paid to him, nor to any other person on his behalf, although Northrop, before such transfer, frequently promised to pay him.

GEO. WHITE, *defendant's counsel and attorney.*

C. STEVENS, *plaintiff's counsel.*

JOHN CURREY, *plaintiff's attorney.*

BRONSON, Chief Justice. Denied the motion, with \$7 costs

on the ground that Robert A. Robinson had denied that he was the party in interest.

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SAMUEL FROST *et al* agt. JACOB B. FLINT, imp'd, &c.

A certificate of a clerk or other officer, intended to be used as evidence on a motion, must be served with other papers for the motion, otherwise it cannot be read in evidence.

*February Term, 1846.*

MOTION by defendant to set aside service of declaration and subsequent proceedings, for irregularity.

Flint, the defendant, swore that the declaration was served on him on the 10th day of December, 1845. It was stated in defendant's papers that no declaration in this cause was *filed* on the 10th of December, 1845, or any time previous thereto, and offered to read a certificate from the clerk to show that fact, which was objected to, because it had not been served; the objection was sustained, and the certificate of the clerk rejected for that reason.

Plaintiffs' attorney produced a letter, in which he enclosed the declaration in this cause to the clerk at Utica, requesting it to be filed, which was dated December 10, 1845, which letter was returned to plaintiff's attorney, and, as appeared from it, the words written across it, "Done December 10, 1845, J. L. B." It was sworn to in plaintiff's papers, that the letter was mailed at Fort Plain on the 10th, and received back \*from Utica on the 11th December. On the 10th, in the evening, the declaration was served on defendant.

P. CAGGER, *defendant's counsel.*

J. WENDELL, *defendant's attorney.*

H. ADAMS, *plaintiffs' counsel.*

H. C. ADAMS, *plaintiffs' attorney.*

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Bogardus agt. Doty.

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BRONSON, Chief Justice. Thought the weight of evidence produced was in favor of the service on the 10th, and denied the motion with costs.

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RACHEL BOGARDUS agt. JAMES DOTY and FREDERICK  
COTTING.

Where a defendant moves to perpetually stay execution, or satisfy the judgment, on the ground that the judgment has been paid, and sworn copies of the receipts of payment are produced, and part of the payments having been explained on the part of the plaintiff, in such a manner that the motion on that ground is defeated; and the defendant then seeks to be let in to defend on the merits, he must have a *regular affidavit of merits for the motion*; the receipts of payment produced are not such evidence of merits as to dispense with a regular affidavit of merits.

*February Term, 1846.*

MOTION by defendant, Doty, for a perpetual stay of execution, and for an order declaring the judgment satisfied.

Judgment was entered in this cause in the court of common pleas of Dutchess county, on or about the 13th September, 1844, for damages and costs, \$560.54. On the 17th February, 1845, the judgment was assigned to John Cotting by the plaintiff. On the same day and after the assignment, A. Wager, Esq., paid to John Cotting, on the judgment, \$268.02, and took his receipt, a copy of which was produced and read. On the 31st July, 1845, John Cotting prosecuted the judgment in this court, and served a copy of the declaration on defendant Doty only. On the 14th of August, A. Wager, Esq., served notice of retainer on plaintiff's attorney, for defendant Doty. On the 5th of September, Wager received notice of taxation of costs, which was the only notice received by him in the cause from plaintiff's attorney. On the 10th September, judgment was entered in the cause in this court for debt for the whole amount of the judgment in the common pleas, to wit: for \$560.54 and \$65.61 costs. On the 23d December last, an execution was issued for the whole

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Bogardus agt. Doty.

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amount of debt and costs, with directions to levy on the joint property of both defendants, and the individual property of Doty only. Defendants' attorney stated that he supposed, by giving notice of retainer, he should be entitled to notice of assessment of the damages as interest on the judgment, and he then intended to have the deduction made of \$268.02, which had been paid on the judgment, and thereby save defendant the expense of a plea and defence. Defendant [\*76] ants' attorney stated that he had calculated the interest on the balance of the judgment, after deducting the payment of \$268.02, up to the 9th January last, and made the amount \$366.49, which amount he paid to the sheriff of Dutchess, together with all the sheriff's fees, and took his receipt, a copy of which was produced and read. Doty stated that the note, upon which the original judgment was obtained, was given for the benefit of Cotting: that he (Doty) was surety.

On the part of the plaintiff, it was denied that Doty was the surety on the note, and Cotting the principal; but the note was given by Cotting & Doty, and the funds all used in their copartnership business, as lumber dealers. After their dissolution, Cotting ascertained, on examination of their books, &c., that Doty would be indebted to him in about the sum of \$1,100, and that the note held by the plaintiff was put into the hands of A. Wager, Esq., for collection, with the understanding between Cotting and Wager that the whole amount should be collected of Doty; soon after the note was left with Wager for collection, Cotting put into the hands of Wager \$268.02 to apply on the note, upon the express and distinct understanding, between Cotting and Wager, that the same was to be applied only in case Cotting and Doty could settle their matters in a friendly way, and without going to law. Wager prosecuted the note to judgment against both defendants, and issued execution against both. It was stated that the amount of money paid by Wager, on the judgment, to John Cotting, was the same that Frederick Cotting left with Wager, to be applied only on the conditions mentioned.



It was stated by Cotting that he had made repeated efforts, in different ways, to settle with Doty, but Doty uniformly declined to do anything to effect a fair and equitable adjustment of their matters in dispute.

A. WAGER, *defendants' counsel and attorney.*

A. TABER, *plaintiff's counsel.*

J. V. A. LYLE, *plaintiff's attorney.*

BRONSON, Chief Justice. Denied the motion with costs, without prejudice.

Defendant's counsel insisted he should be let in to defend the judgment. It was objected that defendant had no affidavit of merits for the motion.

Defendant's counsel insisted that the special statement, that the judgment was paid and the receipts produced, was a sufficient affidavit of merits.

Chief Justice *held*: That there must be a regular affidavit of merits for the motion.

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\*HENRY BENNETT agt. JOSHUA PRATT, Jr., *et al.* [\*77]

Papers for a motion must be served, if they are to be read on the motion. Where defendants' attorney served a notice of motion to quash a writ of error, and particularly set forth the grounds he relied upon, and also served notice of retainer at the same time, which service was admitted by plaintiff's attorney: the defendant's counsel was not permitted to read any other papers on the motion, than those served.

*February Term, 1846.*

MOTION by defendant to quash the writ of error in this cause.

Plaintiff's counsel objected to the service of the papers for this motion. It appeared that the *notice of motion* and a *notice of retainer*, from defendant's attorney, was served on plaintiff,

who was attorney in person, and service by plaintiff admitted. No other papers for the motion were served.

W. J. DODGE, *defendants' counsel.*

S. REXFORD, *defendants' attorney.*

P. CAGGER, *plaintiff's counsel.*

H. BENNETT, *attorney in pro. per.*

Plaintiff's counsel objected to any other papers being read, than those served.

BRONSON, Chief Justice. Denied the motion, with costs, without prejudice.

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JOSEPH F. SIMMONS agt. NATHANIEL McDOUGALL, imp'd with  
CHESTER JOHNSON.

*All the defendants must join in a motion to change the venue, or show an excuse why they do not. (1 Howard's Practice Reports, 156.)*

*February Term, 1846.*

MOTION by defendant McDougall to change venue.

McDougall made the affidavit upon which the motion was made. It was objected by plaintiff's counsel, that the other defendant, Johnson, should have joined in the motion, or showed an excuse why he did not, and cited 1 *Howard's Practice Reports*, 156.

C. STEVENS, *defendant's counsel.*

J. McLEAN, *defendant's attorney.*

A. K. HADLEY, *plaintiff's counsel.*

CHURCH & LEE, *plaintiff's attorneys.*

BRONSON, Chief Justice. Denied the motion with costs, on the grounds stated.

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Frazer agt. Taylor.

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JOHN S. FRAZER agt. JOHN W. TAYLOR and LOYAL S. POND.

Several matters, sought to be replied to a plea, must be sworn *to be true*; stating *that, to the best of his knowledge, information and belief, they are true*, is not sufficient.

*February Term, 1846.*

MOTION by plaintiff for leave to reply, several matters.

This was an \*action of assumpsit commenced by [\*78] declaration, 22d September, 1845, to recover from the defendants, who were copartners in trade, a large sum of money. The defendants pleaded, 1st, the general issue; 2nd, the statute of limitations; 3d, a discharge under the late bankrupt law of the United States. The plaintiff stated *that, to the best of his knowledge, information and belief*, the 1st and 3d pleas of defendants were untrue; and, as to the 2d plea, he intended to reply a subsequent promise within six years from the commencement of the suit.

Plaintiff then stated it was necessary, as he was advised by his counsel and believed, that he should be allowed to reply to the 3d plea; 1st, that the plaintiff's debt or claim was created while the defendants were acting in a fiduciary capacity, and was not provable under the act; 2d, a new promise pending the proceedings in bankruptcy; 3d, that the discharge was void for fraud and wilful concealment of the property of the defendants. And the plaintiff further deposed in his affidavit, that the several matters desired to be replied to the said 3d plea, as above mentioned, were true *according to the best of his knowledge, information and belief*. The defendants produced a copy of the original objections interposed by the plaintiff to prevent their discharge under the bankrupt law, and also a copy of the voluntary withdrawal of those objections previous to their discharge, and made affidavit that their 3d plea was true in substance and matter of fact. Defendants' counsel insisted that the plaintiff had not sufficiently verified the matters sought to be replied; he had not sworn they were true, nor that he was informed and believed they

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Ferris agt. Betta.

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were true ; but had sworn *that, to the best of his knowledge, information and belief*, they were true.

M. T. REYNOLDS, *plaintiff's counsel.*

DILL, DAVIDSON & EGAN, *plaintiff's attorneys.*

N. HILL, Jr., *defendants' counsel.*

BRADY & MAURICE, *defendants' attorneys.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that the matters sought to be replied by plaintiff were not sufficiently verified.

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DANIEL FERRIS agt. DANIEL S. BETTS.

SAME agt. SAME.

On a motion for consolidation, costs will not be allowed, where the motion is granted.

*February, Term, 1846.*

MOTION by defendant to consolidate these suits into one.

Defendant's affidavit stated that each of the suits was founded on a judgment rendered in the superior court of the state of Connecticut. The judgments were rendered [\*79] \*long before the commencement of these suits. The suits were commenced at the same time ; and the cause of action was such that they might properly be joined in the same declaration ; the questions which would arise in both were substantially the same, and the defence in both was substantially the same.

W. J. DODGE, *defendant's counsel.*

GARDNER & BURDICK, *defendant's attorneys.*

J. J. RING, *plaintiff's counsel.*

J. BIGELOW, *plaintiff's attorney.*

BRONSON, Chief Justice. Granted the motion, *without costs.* Defendant's counsel insisted they should be allowed costs.



Chief Justice said they allowed no costs in cases of consolidation.

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WILLIAM P. SWIFT *et al.* agt. DAVID L. WELLS.

One bill of goods, containing fifty different items, delivered at one time, is in fact but one item; and a motion for a reference upon such a bill, as containing a long account, will be denied.

*February Term, 1846.*

MOTION by defendant for a reference.

It appeared from defendant's papers that the declaration in this cause contained seven counts in assumpsit; the pleas were the general issue with notice of set-off and plea of payment. The cause was once tried at the circuit, and verdict rendered for the plaintiffs; a new trial was subsequently ordered by this court, and the cause was again noticed for trial. The plaintiffs' bill of particulars contained a list of fifty items; and the defendant's bill of particulars seven items; that it required the examination of a long account on the part of the plaintiffs, at the former circuit, and would again require the examination of a long account on the part of the plaintiff on the trial.

It appeared from plaintiffs' papers, that the only demand which plaintiffs claimed in this cause was, the balance due on a bill of goods which had previously been sold to defendants; the goods were all sold at one time, and made but one bill; and the gross amount of the bill was agreed upon at the time of sale; the defendant had no set-off of any kind, and the only question raised was, as to payment.

H. H. MARTIN, *defendant's counsel.*

HUNT & WALRADT, *defendant's attorneys.*

C. P. KIRKLAND, *plaintiffs' counsel.*

DALLIBA & CLARK, *plaintiffs' attorneys.*

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Bissell agt. Dayton.

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BRONSON, Chief Justice. Denied the motion, on the ground that one bill of goods, containing fifty different items, delivered at the same time, was in fact but one item.

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[\*80] \*MARTIN C. BISSELL agt. ORANGE W. DAYTON.

Where there is a *verbal agreement* by defendant to pay costs, to have cause put over the circuit, the plaintiff cannot have an *attachment* for the collection of such costs.

Taxation of costs after the day noticed for taxation, without a new notice to the opposing attorney, is irregular.

*February Term, 1846.*

MOTION by plaintiff for an attachment against defendant to collect costs of circuit.

It appeared from plaintiff's papers that this cause was noticed for trial for the June circuit in Allegany county, 1841; the plaintiff had subpoenaed his witnesses and was prepared for trial, when defendant's attorney informed plaintiff's attorney that defendant would not be ready for trial at that circuit, on account of the absence of a material witness, and requested the cause put off, and the costs of the circuit should be paid.

Plaintiff's attorney, upon the information, suffered the cause to go off upon payment of costs; got his bill of costs taxed at \$23.56, on notice to defendant's attorney; but was never after able to get any part of it, from the defendant or his attorney; having been in hopes that it would be paid without application to the court, was his excuse for the delay.

Plaintiff's attorney stated, that previous to the sitting of the circuit, and after notice of trial was served, he proposed to defendant's attorney to let the cause go over the circuit, as the defendant had a material witness absent, and could not try it; and proposed also to pay the costs incurred on the part of the plaintiff, in pursuance of the notice; to which proposition plaintiff's attorney assented, and said he had subpoenaed but

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Bissell agt. Dayton.

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one witness, and if he would refund the money, there would be no witnesses' fees for defendant to pay.

In pursuance of such arrangement, the cause went over the circuit, and neither party or their witnesses attended the circuit. Shortly after the close of the circuit, plaintiff's attorney presented a bill of costs for payment, amounting to about \$24.00, including in it a charge for brief on trial \$3; copy pleadings \$3; attorney's fee \$3; counsel fee \$5; and from \$6 to \$8 witnesses' fees; which bill of costs defendant's attorney refused to pay, but would pay all taxable costs and expenses of the plaintiff up to the time of the arrangement, which offer plaintiff's attorney declined. Plaintiff's attorney gave notice of taxation of the bill of costs before a supreme court commissioner, and on the day noticed defendant's attorney appeared to oppose the taxation; and the commissioner was absent from home, and did not return until the next day; after his return, defendant's attorney was informed that plaintiff's attorney \*appeared before the commissioner, [\*81] and had the bill taxed ex parte. About the 1st January, 1842, this suit was discontinued.

J. H. COLLIER, *plaintiff's counsel.*

S. S. HAIGHT, *plaintiff's attorney.*

H. HARRIS, *defendant's counsel.*

W. ANGEL, *defendant's attorney.*

BRONSON, Chief Justice. Denied the motion with costs. 1st. On the ground that the costs were taxed a day after the day noticed for taxation, without notice for the day on which they were taxed. 2d. On the ground that an attachment cannot issue for costs of circuit upon a *verbal agreement* by defendant to pay costs, if the cause is put over the circuit.

WILLIAM PEASE agt. HIRAM S. BLOSSOM *et al.*

Where a cause is not *brought to a hearing* within forty days after the service of a notice requiring it to be done, under the rule, defendant may move and obtain judgment as in case of non-suit.

*Noticing* the cause within the forty days is not enough; it should be *brought to a hearing*.

*February Term, 1846.*

MOTION by defendants for judgment as in case of non-suit, for not bringing the cause to a hearing.

At the last September special term of this court, the venue in this cause was changed from the city and county of New-York, to the county of Washington; and at the same time the cause was referred, and by agreement, to JOHN McLEAN, Esq., first judge of Washington county, as sole referee. On the 4th September, 1845, copies of the rules changing the venue and for reference were served personally on R. H. Shannon, Esq., attorney for plaintiff; the cause not having been noticed for hearing, defendants' attorneys served plaintiff's attorney with a notice, requiring plaintiff to bring the cause to a hearing within forty days after service of that notice; which notice was served and service admitted by plaintiff's attorney on the 21st of October, 1845.

On the 29th day of November, 1845, plaintiff's attorney mailed at New-York a notice that the cause would be brought to a hearing before the referee on the 12th day of January, 1846, which notice was received by defendants' attorneys on the 3d day of December, 1845.

On the 23d December, the papers for this motion were served by mail. It was alleged by defendants' counsel, that the plaintiff had not brought the cause to a hearing according to the rules and practice of the court.

Plaintiff's attorney stated he should have proceeded in good faith to have brought the cause to a hearing, according to the notice served by him on the 29th November, if he had not been stayed by the papers for this motion.



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Benedict agt. Lord.

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\*Plaintiff's counsel insisted that, if the cause was [\*82] noticed for hearing within the forty days, it was sufficient under the rule.

J. W. THOMPSON, *defendants' counsel*.

J. W. & O. F. THOMPSON, *defendants' attorneys*.

J. S. LAWRENCE, *plaintiff's counsel*.

R. H. SHANNON, *plaintiff's attorney*.

BRONSON, Chief Justice. It is not enough to notice the cause for hearing within the forty days; the language and meaning of the rule is, that it shall be *brought to a hearing* within forty days. Motion granted.

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JOSEPH BENEDICT agt. AMASA LORD.

Service of affidavit or case, with notice of motion to set aside report of referees, is ~~not~~ a stay of proceedings *per se*, until the case is settled; but an order must be obtained.

*February Term, 1846.*

MOTION by defendant to set aside judgment for irregularity.

This was a case where the defendant's attorneys had served plaintiff's attorney with copy case and papers for a motion to set aside the report of referees, without any order to stay proceedings. Plaintiff's attorney gave defendant's attorneys written notice as follows: (title of the cause) Gent. Judgment has been entered upon the report of referees. I do not regard your papers as regular, and that no motion can be made upon them.

C. P. KIRKLAND, *defendant's counsel*.

SHERWOOD & NYE, *defendant's attorneys*.

M. T. REYNOLDS, *plaintiff's counsel*.

O. M. BENEDICT, *plaintiff's attorney*.

BRONSON, Chief Justice. Denied the motion, with costs,

without prejudice, on the ground that service of affidavit or case, with notice of motion to set aside report of referees, is not a stay of proceedings *per se* until the case is settled; but an order must be obtained.

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LEVI HARRIS agt. RALPH CLARK *et al*, ex'rs, &c.

In an affidavit for a motion to change venue, defendant must swear that each and every of the witnesses, &c.; "all and every of the witnesses, &c.;" held bad.

*February Term, 1846.*

MOTION by defendants to change venue.

Objection was made to the sufficiency of defendant's affidavit upon which he moved: that part objected to, read as follows: "and that, as he is advised by the said counsel and verily believes, the defendants cannot safely proceed to the trial of this cause, without the testimony of *all* and every of the witnesses above named, (instead of *each* and every of the witnesses, &c.)

G. R. J. BOWDOIN, *defendants' counsel*.

J. H. MAGHEE, *defendants' attorney*.

P. CAGGER, *plaintiff's counsel*.

J. E. BABCOCK, *plaintiff's attorney*.

BRONSON, Chief Justice. Thought this point was decided as long ago as the 9 *Wend*. Motion denied, with costs, without prejudice.

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[\*83] \*ROBERT MILLS agt. ARUNAH M. ADSIT.

An affidavit made for change of venue should repeat the advice of counsel as follows: after stating that he "cannot safely proceed to the trial of this cause, without the benefit of the testimony of each and every of the said witnesses," as he is also advised by his said counsel and verily believes to be true, should be stated in each case after naming "witnesses." (3 *Wend*. 425.)

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Merritt agt. Gosman.

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*February Term, 1846.*

MOTION by defendant to change venue.

Defendant's affidavit was objected to as insufficient; that part of the affidavit objected to read as follows: "that he has a good and substantial defence on the merits to the whole of the said plaintiff's demand, as he is advised by his said counsel and believes to be true; that he has also fully and fairly disclosed to his said counsel what he expects to prove on the trial of this cause by each and every of the witnesses hereinafter named; that he cannot safely proceed to the trial of this cause without the benefit of the testimony of each and every of the said witnesses; that the testimony of each and every of the said witnesses is material and necessary to this deponent on the trial of said cause, as he is advised by his said counsel and verily believes to be true." The objection was made to that part which reads, "that he cannot safely proceed to the trial of this cause without the benefit of the testimony of each and every of the said witnesses," *as he is also advised by his said counsel and verily believes to be true*, should have been inserted after witnesses, and cited 3 *Wend.* 425.

F. S. EDWARDS, *defendant's counsel.*

M. BROWN, *defendant's attorney.*

E. QUIN, *plaintiff's counsel.*

E. & G. E. QUIN, *plaintiff's attorneys.*

BRONSON, Chief Justice. Denied\* the motion with costs without prejudice, for the defect mentioned.

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ISAAC MERRITT *et al.* agt. HENRY R. GOSMAN, imp'd, &c.

TAXATION OF COSTS.

In an action of debt on a money bond and judgment by default, the costs can be taxed by items.

*February Term, 1846.*

MOTION by defendant for retaxation of costs.

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Peck agt. Corning.

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This suit was commenced by declaration in an action of debt on a bond for the payment of money; defendant demurred to the declaration; plaintiff amended declaration; no demurrer or plea was interposed to the amended declaration; no issue was joined in the cause upon it, and plaintiff took judgment by default. Plaintiff's attorney made out his bill of costs by items on the taxation. Defendant's attorney [\*84] objected to the whole bill generally, on \*the ground that the plaintiff could not tax the bill by items, upon a default; and to every item specifically, except such as were taxable by statute upon a default.

S. O. SHEPARD, *defendant's counsel.*

HARRIS & SHEPARD, *defendant's attorneys.*

A. K. HADLEY, *plaintiffs' counsel and attorney.*

BRONSON, Chief Justice. The costs can be taxed *by items*, it does not come within either of the two classes of cases in the statute; the costs in that respect was properly taxable. As regards the items of *brief* and *counsel fee*, they were improperly taxed, there not having been any issue of law or of fact joined. The plaintiff amended his declaration; therefore the *amended declaration* was not taxable. *Drawing bill of costs*, \$1.00 was taxed too much; there was no trial or argument, \$0.50 was a proper charge, and \$0.50 *for the two copies*. All of the charges for *amended pleadings* were improperly taxed, \$9.25; these items, amounting in all to \$16.25, must be stricken from the bill and endorsed on the execution, if issued.

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JOHN H. PECK agt. JAMES CORNING.

Where the *facts and circumstances are important*, a writ of inquiry of damages, noticed for execution before a sheriff's jury, will be (in the discretion of the court) ordered to be executed before a jury at the circuit, although difficult questions of law are not expected to arise.

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Peck agt. Corning.

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*February Term, 1846.*

MOTION by plaintiff, at last December special term, for an order of this court directing the writ of inquiry in this cause to be executed at the circuit.

The facts in this case, as appeared, were, that the plaintiff resided in Burlington, in the state of Vermont, and was one of the most respectable citizens of that state.

The defendant, a resident of the city of Troy, N. Y., a son of the mayor of that city, and a merchant, doing extensive business in the city of Troy; defendant was related to some of the most respectable and influential families of that place. This was instituted to recover damages for an assault and battery committed by the defendant on the plaintiff on the 16th August, 1845, in the city of Troy; the venue was laid in Rensselaer county.

The defendant had suffered a default to be entered for want of a plea.

Plaintiff stated that the assault and battery was wholly unprovoked and unjustifiable, and was committed by the defendant with great preparation and deliberation, and under the following circumstances: while plaintiff \*was [\*85] in waiting on his wife and other ladies traveling in company, from the Troy House, where they had stayed the night previous, to the morning train of cars, having passengers on board going to Saratoga Springs, and while plaintiff was standing on the side-walk in front of the Troy House, the defendant, with a whip in his hand, which plaintiff thought defendant had concealed and drew from under his coat, and which plaintiff thought was a raw-hide, then and there gave plaintiff three violent blows over his arm and shoulders, in the presence of many citizens and travelers assembled in the cars; the defendant gave plaintiff no previous notice of his intentions to assault plaintiff, and committed the assault and battery in the most public manner, and in the opinion of plaintiff at a time and under circumstances the most provoking and insulting. Plaintiff was advised by his counsel, David

Buel, Jr., Esq., that the matters embraced in this suit were proper to be tried by a jury in a circuit court.

JOB PIERSON, *plaintiff's counsel.*

R. CHRISTIE, JR., *plaintiff's attorney.*

G. STOW, *defendant's counsel.*

J. A. MILLARD, *defendant's attorney.*

JEWETT, Justice. It was not denied but that the court may, in a proper case, direct that a writ of inquiry be executed at the circuit. The grounds which have induced courts to grant such indulgence are, where some difficult questions of law are likely to arise in the inquiry, or when *the facts are important* (*Graham's Pr.* 795; 2 *John. Rep.* 107; 18 *Wend.* 658; 1 *Halsted's Rep.* 330). It is not pretended in this case that any such question of law is likely to arise; but it is claimed that the application is brought within the other branch of the rule: that the facts in the case are important. It is shown that both parties have a high standing in the estimation of their fellow-citizens; the plaintiff a resident of an adjoining state; the defendant a resident of the city of Troy, in the county of Rensselaer, where the venue in the cause is laid, the action being local; that the plaintiff, at the time the injury was inflicted, was a traveler with his wife, with other ladies in company; that they had rested the night previous at a hotel in Troy, and were passing from the hotel to a morning train of cars for Saratoga Springs, when the defendant, having deliberately prepared himself with a whip, and without any intimation given to the plaintiff of such intention, in the presence of his wife and other ladies under his charge, without any provocation, and in view of many citizens in a public street in that city, and with the purpose, not only of inflicting great *personal* injury, but the *deepest disgrace* and *insult* within his power, attacked and struck the plaintiff with a whip several violent blows, he being entirely destitute

[\*86] of any \*means of defence. The power which this court is called upon to exercise is discretionary; every case



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Davis agt. Rich.

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must more or less rest upon circumstances peculiar to itself. Taking into consideration the time when and place where the outrage complained of was committed, the peculiar and aggravating circumstances attending it, I am of opinion that although no difficult questions of law are expected to arise, yet that the facts in the case are of sufficient importance to render it a discreet exercise of power to send the writ of inquiry in in this case to the circuit to be executed.

Rule accordingly.

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GEORGE R. DAVIS, Receiver, &c., agt. WILLIAM RICH *et al.*

An *affidavit* sworn before an officer who has no jurisdiction to take it, as appears from the venue in the affidavit, cannot be read on motion.

*February Term, 1846.*

MOTION by defendants, at last December special term, for judgment as in case of nonsuit.

The venue in the affidavit, made on the part of the defendants for the motion, stated it to be "Albany county, ss.," and the affidavit was sworn to before "Abram B. Olin, Recorder of the city of Troy" (Rensselaer county).

L. J. LANSING, *defendants' counsel and attorney.*

D. C. WOODCOCK, *plaintiff's counsel.*

C. M. DAVIS, *plaintiff's attorney.*

Plaintiff's counsel objected to reading the affidavit, for the reason that it appeared that the officer before whom it was sworn had no jurisdiction to take it.

JEWETT, Justice. Denied the motion with costs, without prejudice, for the reason stated in the objection.

MARY S. R. TURNER *et al.* agt. JOSEPH DAVIS.

An order granted by a supreme court commissioner, staying proceedings until plaintiff's attorney produces his authority for commencing an action of ejectment, should state some place at which plaintiff's attorney is to produce the authority; merely signing his name as a "Judge of the County Courts," &c., is not sufficient.

*February Term, 1846.*

MOTION by defendant to set aside default, &c., for irregularity.

This was an action of ejectment, brought to recover possession of a farm in Saratoga county, which the defendant claimed in fee. The authority to commence the suit, nor a copy thereof, of C. Stevens, plaintiffs' attorney, was served on the defendant. On the 4th November last, an order [\*87] was granted by Thomas J. Marvin, Judge of Saratoga county courts and counsellor in this court, ordering a stay of proceedings in the cause until plaintiffs' attorney produced his authority to commence the suit, of which the following is a copy ("Title of the cause"); "On the within affidavit ordered that Cyrus Stevens, Esqr., acting as attorney for the plaintiffs in this cause, do produce his authority for commencing this action in the name of the plaintiffs therein, and all proceedings on the part or in the names of the plaintiffs therein are hereby stayed, until such authority be produced. November 4, 1845. Thos. J. Marvin, Judge of Saratoga county courts, counselor in supreme court." On the 5th December last, a copy of the order and affidavit upon which it was granted, was served on the plaintiffs' attorney. Defendant's attorney stated that he had not been served with a copy of the authority, or notice thereof, in pursuance of the order; and had not been served with any order or rule vacating the order of the judge, or any notice to vacate the order. On the 17th November last, plaintiffs' attorney entered judgment by default.

It was objected to by plaintiffs' counsel that the order of the



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 Clute agt. Tichenor.
 

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judge did not designate any time or place when and where plaintiffs' attorney should produce his authority, and for that reason plaintiffs' attorney had a right to disregard it.

J. C. HULBERT, *defendant's counsel and attorney.*

C. STEVENS, *plaintiffs' counsel and attorney.*

BRONSON, Chief Justice. Plaintiffs' attorney was right in disregarding the order to produce authority; the order should have stated some *place* where authority should be produced; it should have been before the officer at his office or some other place.

The defendant may be let in on terms. Motion granted, on payment of costs of default and subsequent proceedings, and \$7 costs of opposing motion. One other cause, between the same plaintiffs and a different defendant, decided the same.



CHARLES S. CLUTE agt. LEWIS TICHENOR *et al.*

A supreme court commissioner's order staying proceedings in a cause, after it has been noticed for hearing, is a nullity. (97 Rule; 2 Howard's Practice Reports, 37.)

*February Term, 1846.*

MOTION by defendants to set aside report of referees, for irregularity.

This cause was noticed for hearing and served on the 19th of December last, for the 24th December. On the 23d December defendants' attorney\* procured an order of [\*88] a supreme court commissioner upon an affidavit of the absence of a material witness and the loss of a certificate of sale; staying proceedings on the part of the plaintiff until a motion could be made to this court for a postponement of the hearing. On the 24th of December the respective parties and their attorneys appeared before the referees; after the referees

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Waver agt. Hanford.

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were sworn, defendants' attorney moved to have the hearing adjourned, on the ground of the absence of a witness, &c., and read an affidavit of defendant to that effect; which affidavit the referees decided insufficient. Defendants' attorney then served on plaintiff's attorney a copy of the order made by the supreme court commissioner, and a copy of the affidavit on which it was allowed. The defendant did not further appear in the cause, and the plaintiff proceeded to the hearing and took a report in his favor.

G. W. WEED, *defendants' counsel.*

D. J. PULLING, *defendants' attorney.*

JOHN YOUNG, *plaintiff's counsel.*

R. P. WISNER, *plaintiff's attorney.*

Plaintiff's counsel cited 27 rule of this court, and 2 *Howard's Practice Reports*, 37, *Lansing agt. Mickles.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that the commissioner's order was a nullity.

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ORSAMUS WAVER agt. JOHN HANFORD.

TAXATION OF COSTS.

*February Term, 1846.*

MOTION by plaintiff for retaxation of defendant's costs.

This suit was commenced by capias; defendant arrested 3d July, 1845. Notice of retainer was served by defendant's attorney on plaintiff's attorney 5th July, 1845. No other appearance was entered by defendant and no special bail put in. On the 20th October, notice to declare was served on plaintiff's attorney. On the 6th of November, and during the sitting of the court, notice of discontinuance was served on defendant's attorney and that plaintiff would pay costs. On the 24th November, defendant's attorney entered a rule for default for not declaring and judgment for costs. On the 12th December

Cook agt. Finch.

costs were taxed. Plaintiff's attorney objected to the following items:

Brief and copies, . . . . .	\$3.00
Judge signing record, 12½; clerk filing record and entering satisfaction, \$1.12½, . . . . .	1.25
Draft record, \$3.00; execution, \$1.00, . . . . .	4.00
*Furnishing proof notice to declare, 50; affidavit of service, 12½, . . . . .	[*89] 62½
Postage on notice to declare, 5; do. on default, 5, . . . . .	10
Memorandum back, 5; do. on record sent to Fredonia to be signed, 10, . . . . .	15
Do. on return, 10, . . . . .	10
	<hr/> \$9.22

Plaintiff's counsel before the taxing officer objected to the first item, on the ground that no issue was joined, and that no brief had in fact been made; and to the remaining items as unnecessary and improper, as the suit had been duly discontinued, and notice given, that if taxed at all they should be taxed prospectively.

D. McMARTIN, *plaintiff's counsel*.

GEO. W. HOUGHTON, *plaintiff's attorney*.

E. WARD, *defendant's counsel and attorney*.

BRONSON, Chief Justice. Ordered \$3 for brief to be stricken from the bill as taxed, and refunded by defendant to plaintiff or his attorney.

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CHARLES COOK agt. JOHN FINCH.

In an affidavit for a motion to change the venue, the *town* as well as the county in which the witnesses reside must be stated. (1 *Howard's Practice Reports*, 195.)

*February Term, 1846.*

MOTION by defendant to change venue.

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Foote agt. Emmons.

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It was objected by plaintiff's counsel that the defendant's affidavit did not state the *town* where the witnesses resided.

H. WELLES, *defendant's counsel.*

E. VAN BUREN, *defendant's attorney.*

J. A. SPENCER, *plaintiff's counsel.*

L. N. B. VANDERLIP, *plaintiff's attorney.*

BRONSON, Chief Justice. The affidavit is defective in not stating the *town* as well as the county in which the witnesses reside.

Motion denied with costs, without prejudice.

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JEREMIAH FOOTE agt. RODERICK J. EMMONS.

Where one defendant moves in a cause where there are three defendants, his papers should be entitled with the defendant moving, *impleaded with the others.*

Where defendant's attorney moves for one defendant and entitles his papers with the defendant moving *ads.* the plaintiff, when there are three defendants in the suit; motion will be denied with costs, for wrongly entitling the papers.

*February Term, 1846.*

MOTION by defendant to set aside default, &c.

[\*90] This suit was commenced \*by capias against three defendants, to wit: Timothy Sabin, Roderick J. Emmons and Ira Carpenter, and served on them. Declaration filed 1st November, 1845, and judgment perfected December 1st, 1845, against all the defendants.

J. W. PADDOCK, *defendant's counsel.*

STEELE & HUGHSTONE, *defendant's attorney.*

J. H. COLLIER, *plaintiff's counsel.*

MOREHOUSE & LATHROP, *plaintiff's attorney.*

Plaintiff's counsel objected to the entitling of defendant's papers; that they should have been entitled, *Emmons im-*



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Swain agt. Heartt.

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*pleaded with the other defendants.* There was no such suit as the one in which defendant's papers were entitled.

BRONSON, Chief Justice. Denied the motion with costs, on the objection taken.

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JAMES B. SWAIN agt. LAWRENCE HEARTT. \*

Papers, on which a motion is founded for a writ of error *coram nobis*, should not be entitled. (1 *Howard's Pr. Rep.* 175.)

Where infancy is clearly shown for error in fact, it is of course to allow the writ, unless something is shown in answer, which is a bar to it. The assertion of the defendant in reference to another subject matter, that he was of full age, is not an answer to the motion.

*February Term, 1846.*

MOTION by defendant, at last December special term, for a writ of error *coram nobis*.

It appeared from defendant's papers, which were not entitled, that a verdict and judgment for \$300 had been recovered in this court against defendant Heartt, in an action of assault and battery; and that Heartt was, at the time of the joining issue in the cause, an infant under the age of twenty-one years.

On the part of the plaintiff it appeared that it was an aggravated assault and battery, and that the defendant, the fall previous thereto, had asserted that he was "old enough to vote at the general election," and that he had appeared to the action by attorney, and entered special bail, &c. Plaintiff's counsel objected, 1st. That the affidavits for the motion not being entitled could not be regarded: and 2d, that the allowance of the writ was discretionary, and, under the circumstances, should be refused.

Defendant's counsel, in answer to the first objection, cited 1 *Howard's Practice Rep.* 175, and to the second, *Tidd's Practice*, 1196.

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Dimon agt. Dimon.

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A. TABER, *defendant's counsel.*

S. F. REYNOLDS, *defendant's attorney.*

J. MCKOWN, *plaintiff's counsel.*

WARD & LOCKWOOD, *plaintiff's attorneys.*

JEWETT, Justice. Granted the motion.

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[\*91] \*HENRY DIMON agt. DANIEL DIMON.

An affidavit for motion to change venue should state that each and every of the witnesses are *material, &c.*

*February Term, 1846.*

MOTION by defendant, at last December special term, to change venue.

Plaintiff's counsel objected to the sufficiency of defendant's affidavit, which stated (after naming the witnesses) "who each and all reside in Tompkins county, are material witnesses for the defendant on the trial of this cause, without the testimony of whom, and the testimony of each and every of whom, he cannot safely proceed," &c.

J. H. COLLIER, *defendant's counsel.*

S. B. BATES, *defendant's attorney.*

A. TABER, *plaintiff's counsel.*

GATES & MCKAY, *plaintiff's attorneys.*

Plaintiff's counsel objected to the sufficiency of the affidavit, on the ground that it did not state that each and every of the witnesses were *material, &c.*

JEWETT, Justice. Denied the motion with costs, without prejudice, upon the defects mentioned in the affidavit.

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Arnold agt. Thomas.

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## OLIVER ARNOLD agt. BENJAMIN THOMAS.

Where a defendant is discharged on filing common bail, in pursuance of rule of this court, and the bail-bond to the sheriff is delivered up, and the defendant has left the state, it is too late to move to vacate the rule discharging defendant on common bail, and to require him to give special bail: the order having been complied with, he could not be retaken.

*February Term, 1846.*

MOTION by plaintiff to vacate an order of this court, discharging defendant on common bail.

On the 11th December, 1845, at December special term, a rule was granted by default, on motion of defendant, discharging the defendant in this cause, on his filing common bail. On the 22d December, a copy of the order was served on plaintiff's attorney. On the 24th December, defendant filed common bail, and gave plaintiff's attorney notice of it; shortly afterwards, and before notice of this motion, the bail-bond to the sheriff was delivered up and canceled, and a rule entered and notice given to declare before the end of the next January term. Defendant was a resident of Pennsylvania, and at the time of this motion was in Pennsylvania.

Plaintiff's attorney stated that on the 29th November last, he mailed papers directed to his counsel in Albany, to oppose the defendant's motion; immediately after the copy order was served on him; on the 22d December last, he wrote to his counsel, requesting information in the \*matter, [\*92] and, receiving no reply, again wrote on the 14th January last, and received an answer to the last letter on the 26th January, by which he was informed by his counsel that the papers to oppose the motion had never been received by him, nor the first letter of inquiry written by plaintiff's attorney. Plaintiff's attorney stated that the plaintiff would be in danger of losing his debt, unless defendant was required to put in special bail.

C. STEVENS, *plaintiff's counsel.*

I. A. GATES, *plaintiff's attorney.*

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Daniels agt. Borst.

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M. T. REYNOLDS, *defendant's counsel.*J. H. THOMAS, *defendant's attorney.*

BRONSON, Chief Justice. The bond has been given up, and the defendant left the state before notice of this motion; and further, the order had been complied with and the defendant could not be retaken.

Motion denied with costs.

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SAMUEL DANIELS agt. MARTIN J. BORST, Survivor, &c.

Where defendant removes the cause by certiorari from common pleas, and through his neglect the return to the writ is not made in season to try the cause at the first circuit after the writ is brought, and it appears that it might have been done, although the return day of the writ was subsequent to the circuit, a motion by defendant for a change of venue, subsequent to the return of the writ, will be denied with costs, on the ground of delay.

*February Term, 1846.*

MOTION by defendant to change venue.

This suit was commenced in the Niagara common pleas, where the venue was laid. On the 9th of June, 1845, issue was joined in that court. The action was assumpsit on a promissory note. Defendant removed the cause into this court by a writ of certiorari, returnable at the last October term of this court. Defendant's papers stated special reasons for changing the venue to the city and county of New York. Plaintiff's papers showed that the certiorari was tested in July term, and returnable at October term, 1845, in this court. On the 15th August, plaintiff's attorney served notice of trial on defendant's attorney, for the next term of Niagara common pleas, on the first Monday in September. On the 18th of August, defendant's attorney served notice that the cause was removed by certiorari into this court. On the second Monday of October, 1845, a circuit court was held in and for Niagara county; one week before the return day of the writ of certiorari. After the certiorari was brought, and before the return day, plaintiff's attorney endeavored to get the clerk of



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Carroll agt. Frazee.

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Niagara county to make return to it, but could not do so, as the clerk said that defendant's attorney had not filed his plea and notice, but said he would \*do it when it [\*93] should become necessary for him to make his return; the clerk said he could not make return to the writ until defendant's plea and notice was filed. On the 22d December last, the return was filed with the clerk of this court. On the 24th December, plaintiff's attorney noticed the cause for trial at the circuit to be held on the second Tuesday of March. On the 27th December, defendant's attorney served the papers for this motion.

D. WRIGHT, *defendant's counsel.*

C. R. PARKER, *defendant's attorney.*

M. T. REYNOLDS, *plaintiff's counsel.*

L. F. BOWEN, *plaintiff's attorney.*

BRONSON, Chief Justice. The defendant should have procured the return to the writ of certiorari sooner. Mr. WRIGHT: The Court will not look beyond the time that the cause was in this court. BRONSON, Chief Justice: The Court will look to see whether there has been inexcusable delay by any means. Motion denied with costs.

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PETER CARROLL agt. JOHN O. FRAZEE *et al.*

Costs on a motion for judgment, as in case of nonsuit, granted absolute, *can not be collected on a precept*: they should be included in and collected in the general costs of the cause.

*February Term, 1846.*

MOTION by plaintiff to quash or set aside a precept for irregularity, and for discharge of plaintiff from imprisonment.

The defendants in this cause obtained a rule for judgment, as in case of nonsuit, *with ten dollars costs*, by default, on the 10th day of December last, at special term. Defendant's attorneys' made out their costs, and had them taxed on notice

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Teal agt. Tinney.

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on the 19th December last, and perfected judgment on the 22d December. The ten dollars costs on the motion were not taxed in the general bill, and included in the judgment record. On the 16th December, one of defendants' attorneys demanded of Carroll, the plaintiff, ten dollars, the costs of the motion for judgment as in case of nonsuit; which he refused to pay; and on the 18th of December a precept was issued for the ten dollars costs, and Carroll arrested and imprisoned.

N. HILL, JR., *plaintiff's counsel.*

GAY & BEACH, *plaintiff's attorneys.*

R. W. PECKHAM, *defendants' counsel.*

VAN DRESAR & ELWOOD, *defendants' attorneys.*

BRONSON, Chief Justice. The costs should have been included in the general costs of the cause. Where judgment as in case of nonsuit is granted absolute, the costs of the motion cannot be collected on a precept: they should be collected as the general costs are.

Motion granted.

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[\*94]     \*ANDREW TEAL *et al.* agt. OLIVER TINNEY *et al.*

The *title of the court* should appear in or on a declaration, filed and served.

*February Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings, for irregularity.

The declaration filed in this cause, the copy declarations served on each of the defendants, and the copy declaration containing the sheriff's return, upon which the default was entered, *were not entitled in any court.* They commenced as follows: "Of the term of July, to wit, of the eleventh day of October, as yet of the term of July," &c.

The indorsement on the back of each was as follows: "State of New York;" and then followed the names of the plaintiffs and defendants.

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Van Rensselaer agt. Petrie.

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Defendants stated that they should have pleaded in the suit, if they had known what court they were required to plead in.

A. WORDEN, *defendants' counsel.*

SETH C. HART, *defendants' attorney.*

M. T. REYNOLDS, *plaintiffs' counsel.*

SILL, KIDDER & BRADFORD, *plaintiffs' attorneys.*

BRONSON, Chief Justice. Granted the motion, with \$10 costs, with leave to plaintiffs to amend, by inserting in the narrs the title of the court, and the defendants leave to plead in twenty days after service of amended declaration.

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STEPHEN VAN RENSSELAER and others, executors, &c., agt.  
PETER PETRIE.

STEPHEN VAN RENSSELAER agt. THE SAME.

A declaration must be *personally* served: and such service must be by delivering it to the defendant, or offering it to him *within his reach*, or laying it down *within his reach*.

*February Term, 1846.*

MOTION by defendant to set aside judgment and subsequent proceedings in each cause, for irregularity.

The defendant stated that about six weeks previous to the 29th of October last (the day on which the affidavit was sworn to), he learned for the first time that judgments had been recovered against him in these causes; and a few days after such information, he was informed that the sheriff of Albany county had called at his house (in his absence), and stated that he should advertise defendant's farm for sale. On the 29th of October last, on inquiry at Albany, he learned that judgments were entered in these causes on the 11th June last, and execution in each issued on the 6th September last, in the first suit for the sum of \$75.33, and in the second suit for the sum of \$197.71. He stated that he never was served with

[\*95] any declaration, or with any \*other process, for the commencement of either of the suits: this he knew and stated positively. He did not know the sheriff of Albany county, nor was he acquainted with David Russell, his deputy: but, some time in May last, a person came to the premises of defendant, who defendant was informed and believed was David Russell. Russell was at no time nearer to defendant than about three rods, and he was certain not nearer than two rods and a half; defendant heard some strange voice, and looked around and saw Russell, as defendant was afterwards informed, and defendant then immediately went away as fast as he could walk; defendant was not certain, but he might have run a little; but it was not much running, had defendant done his best, as he was over seventy-five years of age, and had the feebleness and lack of physical vigor and activity that belonged to his years. Defendant did not, as he positively and unequivocally stated, hear Russell say one word as to his having any declaration or process to serve on defendant in favor of Stephen Van Rensselaer or his executors, or of any other person, or a word about any declaration at all. The only words defendant heard at all were, "good morning," or words to that effect, addressed to defendant's son, who stood much nearer to Russell than defendant did. Defendant was somewhat deaf, and he did not hear any ordinary conversation, unless carried on in a higher or louder voice than usual. Defendant had never had any signs, signals or arrangements whatever, directly or indirectly, whereby he should be notified that the sheriff was coming. But he was informed and believed that horns had been blown, to give such notice in the country; but never with defendant's connivance or procurement. Russell did not attempt to follow him, as he saw or believed. Defendant's son was there, defendant's two daughters and another young woman at the time. Defendant never saw Russell before nor since that one time to his knowledge or belief. Defendant was informed that Russell had been at his house the day before, when he was absent from home; and at the last time Russell was re-



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Van Rensselaer agt. Petrie.

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cognized by one of defendant's daughters. Defendant was informed that the affidavit of Russell, upon which the defaults were entered in these causes, stated that Russell was within ten feet of defendant, and that he cried out to defendant that he had two declarations to serve on defendant, but did not state where defendant was, nor that defendant could or did hear him. Whether the declarations were left in defendant's house on a barrel or not, defendant had no knowledge or information, except from Russell's affidavit. Defendant never saw any such declarations, nor heard of their being left, if they were left, until \*the day he made this affidavit. Defendant swore to merits. Gideon Petrie, a son of defendant, stated that he had heard the affidavit of the defendant read, and knew the contents; and corroborated the statements made by defendant, and stated that at the time Russell came up and said "good morning," he took some papers from his hat and commenced reading from them; that defendant, on account of his distance from Russell, and his deafness, could not, and did not, as he believed, hear any thing that Russell said or read, unless perhaps the salutation of "good morning." Immediately after Russell came up, and before he began to read, defendant had gone away, and was out of their sight; Russell remained but a very few minutes on the premises. Russell deposited some papers on the head of a barrel, the declarations in these suits, and then left, without having an opportunity of saying any thing more to the defendant. Gideon Petrie stated that he took the declarations into his possession, and had had them in his possession and control ever since that time. The defendant never had seen the declarations, and was never informed or knew who had them, nor anything about them, until the time stated by defendant. Laura Petrie, a daughter of the defendant, who was present, corroborated the statements of defendant and Gideon Petrie.

On the part of the plaintiff, David Russell, deputy sheriff, stated that when he went to the house of the defendant to serve the declarations in these suits, he found defendant in

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Van Rensselaer agt. Petrie.

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front of his house; as soon as defendant saw him, and he believed defendant knew him, defendant ran away from him; he immediately cried out to him in a loud voice, that he had two declarations to serve on him, one for Stephen Van Rensselaer, and the other for the executors of Stephen Van Rensselaer: defendant made no answer, but kept running. Defendant was within ten feet of him, when he told him he had two declarations to serve on him, was quite sure that defendant heard him. Russell then left the declarations in defendant's house on the head of a barrel, and some one in the house threwed them out at him. Russell stated that in every case when he had endeavored to serve a declaration at the suit of Stephen Van Rensselaer, the defendant had made efforts to run away or hide himself, and avoid service. It was always known throughout the manor of Rensselaerwyck, by means of signals familiar to the tenants, when the sheriff or his deputy was out for that purpose. And it very rarely happened that a defendant in any suit in favor of Stephen Van Rensselaer could be found at home or elsewhere by the the sheriff, or that the sheriff or his deputy succeeded in serving a paper on him.

[\*97] \*R. W. PECKHAM, *defendant's counsel.*

J. S. COLT, *defendant's attorney.*

D. McMARTIN, *plaintiffs' counsel.*

VAN VECHTEN & WILKESON, *plaintiffs' attorneys.*

BRONSON, Chief Justice. Held, that the declarations were not personally served; they should have been given or offered to the defendant, *within his reach*, or laid down within his reach.

Motion granted without costs.

HORACE WHITAKER agt. THE BUFFALO COTTON MANUFACTURING COMPANY.

In a summons commencing a suit against a corporation, it is unnecessary under the statute to insert in it the *si te fecerit securum* clause.

*February Term, 1846.*

MOTION by defendants to set aside summons and all subsequent proceedings.

The defendants were served with a summons commencing the suit in this cause, on the 31st December last. They had not appeared in the cause. Defendants moved to set aside the summons, on the ground that it did not contain a *si te fecerit securum* clause.

N. K. HALL, *defendant's counsel.*

N. K. HOPKINS, *defendant's attorney.*

D. WRIGHT, *plaintiff's counsel.*

S. S. VIELE, *plaintiff's attorney.*

BRONSON, Chief Justice. Held, it was unnecessary to insert that clause under the statute. Motion denied with \$7 costs.

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SAMUEL A. COON agt. LINNARUS P. NOBLE.

Where defendant is served with a declaration in this court, and the notice to plead indorsed on it requires him to plead in *ten* days, &c.; and his default is not entered until more than *twenty* days have expired from the time of service; it is an irregularity which will on motion set aside the default and all subsequent proceedings with costs.

*February Term, 1846.*

MOTION by defendant to set aside default, judgment and subsequent proceedings, for irregularity.

In this case copy narr in this court was served on defendant, with a notice indorsed on the back by plaintiff's attorney, requiring defendant to plead thereto in *ten* days, &c.; service



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Sandland agt. Adams.

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made on defendant on the 27th December last. Defendant swore to merits, and that he did not have time to consult his counsel and make his defence in ten days after the service of the declaration. Plaintiff's attorney showed that defendant's default was not entered until the 19th Jan., 1846, more than *twenty* days after the service of the declaration; that through inadvertence, and having, at the time, declarations in the Albany mayor's court, which requires defendants to [\*98] plead in ten days by the \*rules, he drew the notice to plead on the back of this declaration, and stated the time to plead at *ten* days instead of twenty.

H. HARRIS, *defendant's counsel and attorney.*

J. KOON, *plaintiff's counsel and attorney.*

BRONSON, Chief Justice. Held: that such an irregularity must take the usual course, and granted the motion with costs.

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JOHN SANDLAND agt. EDSON ADAMS.

Where defendant's attorney served an affidavit of merits on plaintiff's attorneys, entitled "Edson Adams ads. John *Sunderland*," and it appeared the plaintiff's name in the cause was John *Sandland*; it was held, that it was another name, and the plaintiff's attorneys were regular in taking the inquest.

*February Term, 1846.*

MOTION by defendant to set aside inquest and all subsequent proceedings, for irregularity.

Issue was joined November 11, 1845, and notice of trial and inquest given for the circuit court held at the city of New York, on the 4th Monday of December last. On the 13th of December, an affidavit of merits, made by defendant, was filed with the clerk of the circuit, being before the first day of the circuit. On the same day, 13th of December, a copy of the affidavit of merits was served on plaintiff's attorneys. On the 23d December, an inquest was taken in the cause, out of its regular order on the calendar,



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 Miller agt. Dows.
 

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by plaintiff's attorneys and judgment subsequently entered up and docketed. The action was assumpsit, for a bill of goods and a promissory note. Plaintiff's attorneys stated that they had never been served with any affidavit or copy of an affidavit of merits *in this cause*. On the 13th December, defendant's attorney served on plaintiff's attorneys a copy of an affidavit in a cause, entitled "Edson Adams ads. John *Sunderland*." Plaintiff's attorneys stated that they were not engaged in such a cause.

J. W. TOMPKINS, *defendant's counsel*.

GEO. MILES, *defendant's attorney*.

J. EDWARDS, *plaintiff's counsel*.

YORK & COOK, *plaintiff's attorneys*.

BRONSON, Chief Justice. Held: that the copy affidavit merits served was not entitled in this suit, the plaintiff was another name. Plaintiff's attorneys were regular in taking the inquest.

Motion denied with costs.

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JAMES MILLER agt. DAVID DOWS and IRA B. CARY.

On a motion to remove a cause from the common pleas into this court, the papers should be entitled in the *common pleas*.

*February Term, 1846.*

MOTION by defendants to remove this cause from the New York \*common pleas into this court, and to [\*99] change the venue.

Defendants' papers for this motion were entitled in the cause, in "New York Common Pleas." Plaintiff's counsel objected that the papers were entitled wrong, they should have been entitled in the "Supreme Court."

H. HARRIS, *defendants' counsel*.

C. VAN SANTVOORD, *defendants' attorney*.

RAYMOND & CLARK, *plaintiff's attorneys*.

BRONSON, Chief Justice. Held: that the papers were properly entitled and granted the motion on the merits upon terms.

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ABRAHAM L. TAYLOR and JOHN BAIRD agt. WM. BOLMER.

Assignees are not liable for costs of a suit, brought by the assignors previous to the assignment and carried on afterwards by the assignors as plaintiffs, and judgment for costs obtained against them by defendant where it appears the assignees did nothing whatever in carrying on the suit, although the claim for which the suit was brought was included in the assigned property.

*February Term, 1846.*

MOTION by defendant that the assignees of plaintiffs pay defendant's costs.

It appeared from defendant's papers that this suit was commenced on the 10th January, 1845. The cause was referred to a sole referee, who, on the 30th September, 1845, signed his report in favor of the defendant. Defendant stated that the plaintiffs were insolvent; that on the hearing, Jacob Miller, one of the assignees of the plaintiffs, was examined as a witness, who produced the assignment and schedules of the plaintiffs, and stated that he and his partner, Isaac Shaurman, were the assignees mentioned in the assignment, and in a conversation stated that they and others of the creditors relied very much upon a recovery in this suit to satisfy their claims against the plaintiffs. The claim for which this suit was brought was included in the assignment. Defendant stated that he was informed and believed that, if the plaintiffs had recovered in this suit, the proceeds would have been paid over to the assignees; and further believed that the assignees encouraged the prosecution of the suit and supplied the plaintiffs or their attorney with funds for that purpose. The defendant's taxed bill of costs had been demanded of plaintiffs' attorney, the plaintiffs and each of the assignees of the plaintiffs, who severally refused payment, Taylor, one of the plain

tiffs, saying, at the time of the demand, that he must consult his assignee, Jacob Miller.

On the part of the assignees, it appeared from the affidavits of each of the assignees and each of the plaintiffs, that this suit was commenced before the assignment was made, that the assignees never advised the \*prosecution, [\*100] and never were consulted in relation thereto, they had never encouraged the prosecution of the suit and never advanced a cent for the purpose; neither of the plaintiffs was consulted by the assignees in relation to the payment of the costs. The assignees wholly denied that they had had anything to do either with the bringing, conducting or continuing the suit; but it had been brought, conducted and managed exclusively by the plaintiffs and the attorney retained by them, and that the proceeds, if the plaintiffs had recovered, would have been paid over to the plaintiffs, although ultimately it might have enured to the benefit of plaintiffs' creditors.

Miller denied the statement alleged by defendant to have been made by him, to wit: "that the assignees and other creditors relied very much upon a recovery in this suit, to satisfy their claims against plaintiffs;" he also stated that he was required by the plaintiffs to attend as a witness before the referee.

Defendant's counsel insisted that the assignees, having accepted the assignment of a claim, knowing it to be in suit, were liable for the costs accrued, as well before as after the assignment. 10 *Wend.* 622. And that one of the assignees, having been present at the hearing of the cause before the referee, as a witness, and suffering the suit to proceed for his benefit, rendered himself a partner liable for the costs, and cited 20 *Wend.* 630; 2 *Cow.* 460; 20 *Johns.* 475; 18 *Wend.* 672; 1 *Howard's Prac. Rep.* 216; 1 *Hill*, 633; *R. S.*, 2d *Ed.*, 515, § 47.

Counsel for the assignees cited 20 *Wend.* 630; 1 *Hill*, 629; 1 *Howard's Prac. Rep.* 216.

W. M. EVARTS, *defendant's counsel.*

M T. BOLMER, *defendant's attorney.*

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Kellogg agt. Kellogg.

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J. DAVIS, *counsel for assignees.*SCOLES & COOPER, *attorneys for assignees.*

BRONSON, Chief Justice. The suit was brought and carried on by the plaintiffs, and by them alone; and the proof is, that the money, had the plaintiffs recovered, was to go into their hands.

Motion denied.

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PEARL KELLOGG *et al.* agt. JAMES KELLOGG.

Service of a declaration in ejectment *on the wife* of a defendant, *off of the premises described in the declaration* (the husband being absent), is irregular; and the service will be set aside, notwithstanding the defendant appears in the cause before the time to plead expires.

*February Term, 1846.*

MOTION by defendant to set aside service of declaration and all subsequent proceedings, for irregularity.

This was an action of ejectment. It appeared from defendant's papers that on the first day of January, [\*101] 1846, \*Polly Kellogg, the wife of defendant, was on a visit at the house of her daughter, Mrs. Slocum's, in Clinton, Oneida county; that while there, one Silas T. Ives served upon her personally a declaration in ejectment in this cause, with the usual notice to plead; that the premises described in the declaration were situated at least two miles from the house of Mrs. Slocum, where the service of the declaration was made. It further appeared, that Ives was not at the house of the defendant on the premises during the 1st day of January, 1846. The defendant was absent from home when the service was made.

It appeared from plaintiffs' papers that on the 8th January, 1846, at the general term of this court, a motion was made and a rule granted, requiring the defendant to appear and plead, &c., which motion was founded on an affidavit made by Silas T. Ives, a deputy sheriff of Oneida county, that he did, on the

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Kellogg agt. Kellogg.

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1st day of January, 1846, serve a declaration in this suit, with notice to plead, &c., by delivering it to Mrs. Polly Kellogg, the wife of the defendant, at the dwelling-house of the defendant, on the premises, the defendant being at the time absent therefrom.

Also an affidavit, that the declaration was in an action of ejectment, claiming to recover the premises upon which Mrs. Polly Kellogg resided at the time of the service made upon her, as stated. It was also stated that prior to the expiration of the time for defendant's appearance, he did duly appear by O. S. Williams, his attorney, and that notice of retainer from Williams was duly served on plaintiffs' attorneys, on the 24th day of January last, and that plaintiffs' attorneys never heard or knew that the declaration and notice were not served on the wife of defendant, as stated in the affidavit of Ives, until the papers for this motion were served.

Defendant's counsel stated that the irregularity complained of was, that the *narr* was not served on the premises, and this the statute required. (*R. S. 2d Ed.*, 231 and 232, § 13 and 14.)

Plaintiffs' counsel cited *Rule 26*, and *2 Hill*, 362, to show that notice of retainer was an appearance. The appearance was a waiver of all irregularity in service of the declaration. (*7 Cow.* 366; *7 Johns.* 207.) No injury resulted to the defendant: he was duly informed of the service, assented to it and appeared.

J. A. SPENCER, *defendant's counsel.*

O. S. WILLIAMS, *defendant's attorney.*

C. P. KIRKLAND, *plaintiffs' counsel.*

KIRKLAND & BACON, *plaintiffs' attorneys.*

BRONSON, Chief Justice. Held: the irregularity in the service of the declaration fatal, under the statute, and granted the motion.



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Pepson agt. Ableman.

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[\*102] \*STEPHEN PEPSON agt. CHRISTIAN ABLEMAN *et al.*

Where an attorney has leave to make a case or bill of exceptions, and he prepares and serves a *bill of exceptions*, amendments are proposed, and it is subsequently settled by the circuit judge, but *not signed* by him: the attorney cannot notice it, and bring it on to argument as a *case*.

A bill of exceptions delivered by the circuit judge as settled, but *not signed*, may be *resettled*, after it has been noticed for argument and the argument moved on; objection being made to the argument, because the bill is not signed.

*February Term, 1846.*

MOTION by defendant to set aside an order of the circuit judge, granting a new trial to the plaintiff.

This cause was tried 3d February, 1844, at the Albany circuit; a verdict was rendered for all of the defendants. Exceptions were taken by plaintiff's attorney on the trial to the ruling of the circuit judge. A bill of exceptions was afterwards made out by plaintiff's attorney, and a copy served on defendants' attorney. Amendments were proposed and served, and the bill and amendments left with the late circuit judge for settlement. The judge settled the bill, and returned it to plaintiff's attorney. The cause was noticed for argument before the circuit judge in office, for the first Monday in December last. After the argument had been moved by plaintiff's counsel, it was objected by defendants' counsel that the bill was not signed by the late circuit judge; plaintiff's counsel then proposed to argue it as a case, which was objected by defendants' counsel; the argument was thereupon put off until the next day. On the same day the argument was moved, the attorneys for the respective parties appeared before the late circuit judge, and defendants' attorney objected to the bill being signed, on the ground that it was not settled correctly, in an important particular. The late circuit judge not being able to find his notes of trial at that time, postponed the signing of it until the next day, when defendants' attorney appeared, and the plaintiff's attorney wrote a letter to the judge, by which letter the late circuit judge concluded plaintiff's attorney intended to withdraw the bill, and so informed defendant's at-

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Pepson agt. Ableman.

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torney; and also stated that he had found his notes of trial, and from those it appeared the bill was incorrectly settled in the particular mentioned by defendants' attorney, and gave defendants' attorney a certificate to that effect, dated December 2, 1845. On which day plaintiff's attorney took a rule by default granting a new trial in the cause before the circuit judge holding the term.

Plaintiff's papers showed that the bill was left for settlement with the late circuit judge on the 6th April, 1844, and sent by the judge to plaintiff's attorney on the 28th June following. Plaintiff's attorney returned the bill to the judge, with a request to have him review the settlement; some five or six months afterwards, defendants' attorney took the \*bill from the circuit judge and delivered it to plain- [\*103] tiff's attorney, saying that the judge refused to alter the settlement; it was right as it was. On the 20th November, 1845, plaintiff's attorney served on defendants' attorney a copy of the case as settled; that no objections were made to the settlement by defendants' attorney, until the day of the argument. Plaintiff's attorney insisted that, as he had thirty days to make a case or bill of exceptions, if the bill was not signed it was a case. And that he was regular in taking the rule, for the reason that the argument was opened, and postponed for one day, *only*, for the purpose of having the bill signed and not for a resettlement, and that the bill was correct.

R. W. PECKHAM, *defendants' counsel*.

J. L. BURTON, *defendants' attorney*.

J. PERCY, *plaintiff's counsel and attorney*.

BRONSON, Chief Justice. The case was improperly noticed for argument; it was in fact a bill of exceptions; but was not signed by the late circuit judge, therefore was not in a situation to be noticed. On the other side they have been dilatory.

*Decision.*—The rule taken by default in December last va-

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Reynolds agt. Davis.

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cated, and the bill of exceptions referred back to the late circuit judge for resettlement and his signature.

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FOSTER REYNOLDS and MORRIS REYNOLDS, plaintiffs in error,  
agt. CHARLES A. DAVIS and SIDNEY BROOKS, defendants  
in error.

Where cross suits in error are prosecuted by the respective parties in the same cause, and the defendants in error, in one writ, interpose a special plea in bar to plaintiff's assignment of errors therein, being in substance *the pendency of another writ of error in the same cause*; such a plea will be stricken out as false and frivolous.

*February Term, 1846.*

MOTION to strike out plea as false and frivolous.

In this cause the plaintiffs in error sued the defendants in error in the New York superior court, in assumpsit, claiming to recover about \$18,000, but actually recovered a verdict for only about \$9,000. The plaintiffs took exceptions to decisions of the court below, by which his recovery was limited to the latter sum; and the defendants also excepted to decisions whereby the plaintiffs were permitted to recover at all. Each party brought a writ of error to this court, returnable at the same term. The above named defendants first assigned errors upon their writ of error, to which the above plaintiffs put in the usual joinder in error, except that, for the usual prayer that the judgment be affirmed, there was substituted a prayer that the writ of error be dismissed. The above plaintiffs then assigned errors upon their writ of error; to which the defendants interposed a special plea in bar, which was in substance a plea of *the pendency of another writ of error in the same cause*.

[\*104] \* This was a motion to strike out this plea as false, so far as it misrepresented the prayer of the plaintiffs' joinders in error, and as frivolous, being no answer to the plaintiffs' assignment of errors. And whether cross suits in



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Reynolds agt. Davis.

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error could be prosecuted by the respective parties in the same cause was the main question.

A. TABER, *plaintiffs' counsel.*

FRANCIS GRIFFIN, *plaintiffs' attorney.*

N. HILL, JR., *defendants' counsel.*

CHARLES C. KING, *defendants' attorney.*

A. TABER, for the motion to strike out the special plea, insisted that a writ of error in a civil case is a writ of right, by any party deeming himself aggrieved by the judgment or proceedings of a subordinate court, which the opposite party could not defeat by prosecuting a writ of error in the same cause. That there was no reason for attaching such a limitation to an unqualified right secured by statute, since it was clear that a party could not avail himself of his bill of exceptions upon his adversary's writ of error. That several writs of error, by different parties in the same cause, involved no incongruity of practice or principle, and were supported by precedent and authority, and cited 2 R. S., 591, § 1, *Cox agt. United States*; 6 *Peters*, 172, *Birkhead et al. agt. Brown et al.*; 5 *Hill*, 634; cases cited *Til. and Yates on writs of error*, 235-6; 2 R. S., 592, § 3.

N. HILL, JR., insisted that the plea in question was a valid bar. That the pendency of the first suit in error was a bar to the second, prosecuted for the same cause, that is, for the reversal of the same judgment, between the same parties, and cited 6 *Com. Dig. Pleader*, 3 b. 18 and 19; *Houghton agt. Starr*, 4 *Wend.* 182; *United States agt. Tingey*, 5 *Peters*, 180; 1 *Chit. Plead.* 558, note k and 2.

BRONSON, Chief Justice. Granted the motion but without costs, as the question was new in this court.

SIMEON B. JEWETT agt. THOMAS J. PATERSON, imp'd, &c.

Costs will not be allowed on demurrer to a *plea in abatement*.

*February Term, 1846.*

MOTION by defendant to set aside default and all subsequent proceedings.

The defendant interposed a plea in abatement in this cause, to which plaintiff's attorney demurred; defendant joined in demurrer. The demurrer was noticed by plaintiff's attorney as frivolous, and at the last October term (on the 21st October) judgment was rendered for the plaintiff. On the 28th October, defendant's attorney served a plea and affidavit in the cause on plaintiff's attorney by mail; on the same day defendant's attorney was served with a copy of a bill of costs on the decision

of the demurrer. It appeared that the rule was entered, [\*105] ed, \*"*judgment for the plaintiff on the demurrer to the plea in abatement of said Patterson: and that the*

*defendant pay the plaintiff's costs* on said demurrer; answer over to the declaration of the plaintiff within ten days, &c." The rule was entered from a draft furnished by plaintiff's counsel. On the 31st October, defendant's plea was returned by plaintiff's attorney, stating he declined to receive it until the costs were paid. Defendant's attorney, on the 1st November, moved the court (then in session) to correct the entry of the rule by striking out the costs, which was granted; before the 17th November, defendant's attorney served copy of amended rule on plaintiff's attorney, which plaintiff's attorney admitted he had received. On the 17th November, defendant's attorney reserved the plea and affidavit on plaintiff's attorney by mail. On the 24th of November, defendant's attorney received a letter from plaintiff's attorney stating that the defendant's default was entered on the 22d November. Plaintiff's attorney had not returned the plea and affidavit last served. Defendant's attorney served plaintiff's attorney with copy of the rule on demurrer as amended, and a stipulation to pay costs of default, &c., to have the same opened for the purpose of

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Chapin agt. White.

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saving a motion merely; which service was admitted by plaintiff's attorney on the 10th of January, 1846, and a refusal by him to open the default.

A. TABER, *defendant's counsel.*

H. GAY, *defendant's attorney.*

S. L. SELDEN, *plaintiff's counsel.*

S. R. S. MATHER, *plaintiff's attorney.*

BRONSON, Chief Justice. Granted the motion with costs, on the ground that the rule for judgment on the demurrer was incorrectly entered by plaintiff's counsel, in ordering the defendant *to pay the plaintiff's costs on the demurrer.* The first service of plea and affidavit were held good for that reason.

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GEORGE L. CHAPIN agt. ALFRED WHITE.

Bail should justify, *each, in double the amount* for which the defendant is ordered to be held to bail.

*February Term, 1846.*

MOTION by plaintiff to set aside justification of bail.

The defendant was sued by *capias*, and held to bail in the sum of \$600 by a supreme court commissioner. Exception was taken to the bail, who justified in the sum of *six hundred dollars each*, over and above all debts, &c.

M. T. REYNOLDS, *plaintiff's counsel.*

JUDD & LEWIS, *plaintiff's attorneys.*

D. WRIGHT, *defendant's counsel.*

GEO. B. JUDD, *defendant's attorney.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that the bail should have justified *each in double the sum of six hundred dollars.*



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Cook agt. Kirtland.

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[\*109] \*In the matter of the application of THOMAS W. COOK and ELIPHALET W. SHERWOOD agt. AM BROSE KIRTLAND, Assistant Justice of the city of New York.

An alternative mandamus will be allowed, requiring a justice to issue an execution upon a judgment rendered by and before him, where he refuses, on the ground of want of jurisdiction; it appearing that an appellate court decided that he had jurisdiction.

*April Term, 1846.*

MOTION *ex parte* for a mandamus.

The applicants, Cook & Sherwood, commenced a suit by personal service of summons, and on the 25th of September, 1844, recovered a judgment for \$36.12 damages and costs, before A. Kirtland, Esq., assistant justice of the city of New York, against Daniel Cutter.

On the 1st of October last, plaintiffs' attorney in the judgment applied to the justice for execution; the justice refused to issue it, on the ground that he had been informed, after the judgment was rendered, that the defendant Cutter was, at the time the suit was commenced and judgment recovered, a non-resident, residing in the county of Kings, and that the summons was made returnable more than four days from its date, in violation of the § 33 of the act entitled, "An act to abolish imprisonment for debt," &c., passed April 26, 1831. Cook & Sherwood thereupon commenced an action of debt on the judgment, in the marine court of the city of New York. Cutter pleaded the fact that he was a non-resident at the time the suit before the assistant justice was commenced, and judgment rendered, and that the judgment was therefore void for want of jurisdiction. The marine court [\*110] rendered judgment for the defendant Cutter on the ground stated.

Cook & Sherwood removed the cause from the marine court, to the superior court of the city of New York, by certiorari, where the judgment of the marine court was reversed

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Lester agt. Blodgett.

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without costs. Cook & Sherwood thereupon again requested the assistant justice (Kirtland) to issue execution on the original judgment rendered by and before him, who refused, on the ground that he considered he had no jurisdiction.

A. C. BRADLEY, *counsel*.

MANN & RODMAN, *attorneys*.

BEARDSLEY, Justice. Allowed an alternative mandamus to require the assistant justice to issue an execution, or show cause, &c.

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DAVID LESTER agt. GROW BLODGETT.

*Facts and circumstances* should be fully, particularly and positively stated, in an affidavit to hold to bail. Where the original affidavit to hold to bail is held insufficient, on motion, it is then too late to offer additional affidavits for that purpose.

*April Term, 1846.*

MOTION by defendant to vacate an original order to hold to bail.

This suit was commenced by *capias*, and an order indorsed upon it by the recorder of Buffalo, holding defendant to bail in \$2,000. The *ac etiam* clause was stated as follows: "And also to a bill of the said plaintiff against the said defendant, for making certain false and fraudulent representations to the said plaintiff, by means of which the said defendant procured the said plaintiff to purchase of him a certain bond and mortgage, at and for and to pay therefor a much larger sum than the same was worth, to the said plaintiff's damage of \$3,000." The affidavit, upon which the order to hold to bail was granted, was as follows: "Erie county, ss., Latham A. Burrows, of Buffalo, in the said county, being duly sworn, deposes and says, that in the months of February and March, 1844, he acted as the agent of David Lester, of the city of Brooklyn, in purchasing from Grow Blodgett, of New Fane, in the

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Lester agt. Blodgett.

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county of Niagara, a certain bond and mortgage executed by William Boss to the said Blodgett, and then held by the said Blodgett, which mortgage was upon certain lands in the town of Hartland, in the said county of Niagara; that, during the negotiation which resulted in the said purchase, the said Blodgett represented to this deponent, acting as such agent, that the land embraced in the said mortgage was a certain improved farm lying on the road leading north from Hartland Corners in the said county of Niagara, and about one and a half miles north from said Corners, that there was a house

and other farm buildings on the said land, and that [\*111] a large portion of the same was \*under improvement and cultivation: and this deponent further says that the quantity of land embraced in the said mortgage was one hundred and one acres, as was stated in the said mortgage, and as was then represented to this deponent by the said Blodgett, and that the same, had it been located and been improved and built upon, as it was represented to be by the said Blodgett as above stated, would have been worth about twenty dollars per acre. And this deponent further says, that after the said representations were made by the said Blodgett, and before the said purchase was finally consummated, this deponent caused his son, Roswell L. Burrows, of Albion, in the county of Orleans, to go to the said town of Hartland, to look at the said premises; and that the said Blodgett, as this deponent is informed by the said Roswell L., and also by the said Blodgett himself, and verily believes to be true, then showed to the said Roswell L. a farm lying on a traveled road leading north from the said Hartland Corners, and about one and a half miles north from the said Corners, which farm, as this deponent is informed by the said Roswell L., and believes to be true, was about two-thirds of it under cultivation and improvement, and had upon it a frame house and a log house and a barn, and was worth from twenty to twenty five dollars per acre, and stated to the said Roswell L. that the same was the land embraced in the said mortgage.

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Lester agt. Blodgett.

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And this deponent further says, that relying upon the representations of the said Blodgett so made to him and to the said Roswell L., as aforesaid, this deponent, acting as the agent of the said David Lester, purchased of the said Blodgett the said bond and mortgage, and in payment therefor gave to the said Blodgett the draft of this deponent upon the said David Lester, for the sum of \$1,300, and agreed to procure for the said Blodgett a conveyance to him, from the said David Lester, of certain lands owned by the said David Lester, in the State of Illinois, and that thereupon the said mortgage was duly assigned by the said Blodgett to the said David Lester. And this deponent further says, that the said draft was duly paid by the said David Lester, in the month of March, 1844; and that this deponent procured for the said Blodgett the said conveyance of lands in Illinois, but the said Blodgett never called for the same, and the same was consequently not delivered to him. And this deponent further says, that since the said purchase and assignment of the said bond and mortgage, this deponent has ascertained that the land embraced in the said mortgage is not the same land described to this deponent by the said Blodgett and shown to the said Roswell L., as aforesaid, but that it is a piece of entirely uncultivated and unimproved land, \*without any buildings upon it, [\*112] and not lying upon any open road, and worth not more, as this deponent is advised by persons who are well acquainted with the said land, and capable of estimating the value thereof, than the sum of \$500 in the whole. And this deponent further says, that he verily believes that the said representations of the said Blodgett, made to this deponent and to the said Roswell L., as aforesaid, were known at the time by the said Blodgett to be false, and were made for the purpose of defrauding the said David Lester. And this deponent further says, that the bond of the said Wm. Boss, so assigned to the said David Lester, is worthless, for the reason that the said Boss, as this deponent is informed and believes, was, at the time of the said purchase and until his death, a man of little or no property, and is now dead; and that the

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Lester agt. Blodgett.

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said Blodgett has not repaid any part of the said sum of \$1,300, nor has anything been paid upon the said bond and mortgage, since the same became the property of the said David Lester; and that this deponent is the agent of the said David Lester for collecting the said bond and mortgage and his claims against the said Blodgett.

"And this deponent further says, that the said Blodgett has recently returned from an absence from home of more than three months, during which, some of the family connections of the said Blodgett stated to this deponent, and this deponent believes truly, that they did not know where he had gone, and were apprehensive that he would not return; that the said Blodgett, as this deponent is informed and believes, is in very embarrassed circumstances, and is menaced with various legal proceedings on account of alleged fraudulent transactions, and this deponent is apprehensive that, unless he is held to bail, he will soon depart out of this state, not to return thereto."

The defendant denied the allegation that he had left or intended to leave the state, and stated the particulars of his having been to Michigan temporarily, and denied generally that he was not and had not been menaced with various or any legal proceedings on account of alleged fraudulent transactions. About eight or ten months since, he made a general assignment for the benefit of his creditors. Defendant was imprisoned on the order to hold to bail.

J. A. COLLIER, *defendant's counsel.*

M. M. SOUTHWORTH, *defendant's attorney.*

N. HILL, JR., *plaintiff's counsel.*

L. A. BURROWS, JR., *plaintiff's attorney.*

BEARDSLEY, Justice. The facts and circumstances, to induce a belief that the defendant acted fraudulently in disposing of the bond and mortgage, should have been stated fully and particularly, as also should have been the

[\*113] \*grounds for believing that the defendant intended to depart from the state. These grounds, as far as



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McIntyre agt. Griswold.

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any are disclosed in the affidavit, are slight and equivocal, nor are they stated with directness and particularity. They are also met and explained by the affidavit of the defendant, in which he denies any intention to leave the state. The affidavits were not sufficient to justify an order to hold to bail, and additional affidavits could not now be received for that purpose. The motion must be granted. Motion granted, with costs.

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JOHN MCINTYRE *et al.* agt. NATHANIEL L. GRISWOLD.

A demurrer to the whole of an amended declaration will be allowed, although issue may have been joined on some of the counts in the original declaration; and the amendment of the declaration was granted, specially, on application to the court, without leave given in the rule to plead or demur.

*April Term, 1846.*

MOTION by plaintiffs to take from the files of the court a demurrer, filed by defendant to the plaintiffs' amended declaration.

This suit was commenced by declaration about 25th July, 1843. Defendant's attorney pleaded the general issue to the first four counts of the declaration, and demurred to the fifth and sixth counts. Plaintiffs' attorney joined in demurrer, which was subsequently decided by this court in favor of the defendant with leave to plaintiffs to amend on the usual terms. Plaintiffs did not avail themselves of the leave given to amend. The cause was noticed for trial by plaintiffs on the first four counts, for the King's circuit in Sept., 1843, and at every subsequent circuit to April circuit, 1845. At the last circuit the cause was brought on for trial, when objections were made to certain testimony offered on the part of the plaintiffs, on the ground that a certain contract, offered in evidence, did not, in its date and in certain other particulars, correspond with the statement in the declaration relating thereto; and thereupon a

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McIntyre agt. Griswold.

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juror was withdrawn. Plaintiffs' attorney moved, at the last December special term of this court, for leave to amend the declaration, which was granted so far only as to state the contract mentioned in the declaration truly and such other averments as might be necessary (if any) to make the other averments in the declaration correspond with the contract, when truly stated. In pursuance of the order of the court, an amended declaration was filed and copy served 22d January, 1846. Plaintiffs' attorney alleged that the amendments made to the original declaration were intended to be, and [\*114] \*he believes were in strict conformity to the order; that the amendments did not in any way substantially affect the issue as formerly joined, and were such as to state truly a contract which was before substantially though informally and inaccurately stated; that the contract did not form the basis of the action, but was stated only as a matter of inducement, showing the business and employment of the plaintiffs as builders of piers and bulkheads. On the 10th February, defendant's attorney served a demurrer to the whole amended declaration, with a notice to join in twenty days, &c.

Defendant's attorney stated that the amendments in the declaration related to the statement of a contract in relation to which the circuit judge was of opinion, was the substance of the case of the plaintiffs, and that the action was based upon the contract, so that a variance therein was fatal, and that upon the trial a misstatement of the contract was relied on to sustain the plea of the general issue, and such reliance was held well founded by the circuit judge. He also stated that when the plea was originally put in, he was less conversant with the matters in controversy in the suit than subsequently, and alleged that the proper defence of the suit on the merits required that the defendants should not be limited to the plea originally put in; that the defendants should be permitted to present the questions of law, as the same are presented on the demurrers last put in.

Plaintiffs' counsel insisted that the rule in this cause, allow-

ing the plaintiffs to amend their declaration, gave no right to the defendant to plead *de novo*; and that, without such right reserved in the rule, he could not so plead. 5 *Hill*, 556, *Barstow* agt. *Randall and McCormick*.

M. T. REYNOLDS, *plaintiffs' counsel*.

J. DIKEMAN, JR., *plaintiffs' attorney*.

C. STEVENS, *defendant's counsel*.

D. D. LORD, *defendant's attorney*.

BEARDSLEY, Justice. Had the defendant asked leave to demur to the declaration as amended, when leave to make such amendment was granted, it would have been allowed as a matter of course: and as the demurrer appears to have been put in in good faith, and is a proper mode of presenting the questions of law arising in the case, it should be allowed to stand. Let the plaintiffs join in demurrer within thirty days after service of this rule, the costs of this motion to abide the event of the cause. Rule accordingly.

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\*JABEZ D. HAMMOND *et al.*, adm'rs of Joshua Tuffs, [\*115]  
dec'd, agt. ORRIN E. HARRIS and CHARLES HARRIS.

A judgment, entered on a cognovit given by an attorney who appeared for two defendants copartners, binds the individual property of each defendant, where the suit was commenced by declaration on a promissory note, executed by one of the defendants in the name of the firm, and service of declaration made on that defendant only, who employed an attorney to appear for both defendants in the suit, and to give a cognovit therein.

A *scire facias* may be executed regularly, by directing it to the sheriff of the county where the venue in the original judgment appears to have been laid, although the defendants reside in this state, but not in the county where the venue is laid.

A defendant must swear to merits, if he seeks relief, whether on an original judgment or on *scire facias*.

*April Term, 1846*

MOTION by defendant Orrin E. Harris to set aside a judg-



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Hammond agt. Harris.

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ment and execution against him, and a judgment on *sci. fa.* against him and Charles Harris.

The defendants were copartners in trade in the town of Schroom, Essex county; commenced their business in 1835, under the firm of C. Harris & Co., and dissolved by mutual consent in the summer of 1837. Afterwards Orrin E. Harris sold out all his interest in the business to Charles Harris, who assumed to pay all the liabilities and debts of the firm. Previous to March, 1837, the firm of C. Harris & Co. purchased goods and merchandise of Joshua Tuffs, who was then a merchant in the city of Albany, and on the 10th March, 1837, there was a balance due from the firm to Tuffs, of \$1,560.87, for the payment of which, Charles Harris then gave a promissory note, signed "C. Harris & Co." On the 3d day of November, 1837, Charles Harris informed Tuffs, that he had become the purchaser of the interest of Orrin E. Harris in the partnership business, and had agreed with Orrin E. Harris to pay all debts and liabilities of the firm. Tuffs then requested a judgment to be given on the note, to which Charles Harris assented, and they called on an attorney for that purpose, who informed them it would be necessary to commence a suit on the note, against both the members of the firm, in order to bind the property of Orrin E. Harris; and that Charles Harris might employ an attorney, after the service of a copy of the declaration in the suit upon him, and authorize the attorney to appear and give a cognovit for both defendants, if there was no dispute about the amount due. Accordingly a declaration was made out against both defendants and filed and a copy served on Charles Harris on the 3d of November, 1837, who thereupon employed an attorney to appear for both defendants in the suit, and directed the attorney to give a cognovit in the suit for the amount due on the note. Accordingly a cognovit was given by defendant's attorney, and a judgment thereupon entered by plaintiffs' attorney, [\*116] for \$1,668.36 \*damages and costs against both defendants, and docketed Nov. 3, 1837. On the 14th of November, 1844, Joshua Tuffs died, and Jabez D. Hammond

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Hammond agt. Harris.

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and Amos Dean (the plaintiffs) were in February, 1844, appointed administrators of his estate. It appeared that the administrators were not informed of the existence of this judgment until the month of September last; they then learned that the judgment was unsatisfied, and that no execution had been issued upon it, and that the judgment would have to be revived in the name of the administrators, in order to issue an execution. The attorney for the administrators, on inquiry, not ascertaining the residence of the defendants, issued a writ of *scire facias* to the sheriff of Albany county (where the venue in the original declaration was laid), who returned that the defendants could not be found in his bailiwick, and had no dwelling house within the county. At the last October term of this court, plaintiffs' attorney procured an order for publication in the state paper; at the expiration of the publication of the rule for the defendants to appear and plead, plaintiffs' attorney entered default and rule for judgment and execution, and on the 30th of December last perfected and filed judgment record on the *scire facias*, and on the 31st day of January last issued execution to the sheriff of Washington county. Plaintiffs' attorney stated that he did not find out where defendants resided, until a short time after the entry of judgment on the *scire facias*.

Orrin E. Harris stated that he never knew any thing about the note or judgment, nor the judgment on *sci. fa.* in any way or manner whatever, until called upon by the deputy sheriff of Washington county, in February last, with an execution against him in favor of the plaintiffs in this suit; he also denied ever giving any authority to any one to execute the note, or to give a cognovit for him upon it.

Charles Harris stated that he never knew, heard or supposed, until a few days previous, that a judgment had been obtained in favor of Tuffs on the note against him and Orrin E. Harris; no execution was ever issued on the judgment previous to 1846.

He also stated that he resided in Schroon, in the county of Essex, until 1839, when he removed to Sandy Hill, Washing-

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Stone agt. Smith.

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ton county, where he had ever since resided; that no writ of *scire facias* or notice or proceeding whatever to revive the judgment was ever served on him, and he knew nothing of any such proceedings until in February last. He also stated that he owned real estate, more than sufficient in value to pay and satisfy the claim in this suit.

Defendants' counsel moved to set aside the judgment as against Orrin E. Harris, or that he be allowed to [\*117] come in and defend. Also to set \*aside the proceedings on the *scire facias* as irregular, on the ground that the defendants resided in this state, at the time of publication of the notice, and should have been personally served with the *scire facias*.

O. CLARK, *defendants' counsel*.

H. B. NORTHRUP, *defendants' attorney*.

JOHN NEWLAND, *plaintiffs' counsel and attorney*.

BEARDSLEY, Justice. The original debt was due from both the defendants to the deceased (Tuff's), and as an attorney appeared for them, and confessed judgment, that is regular. The judgment on *scire facias* is also regular. It is not suggested that the attorney who confessed the judgment is irresponsible, so that the parties can have no adequate remedy against him, if he acted without authority; nor are merits sworn to. It is not pretended that any defence could be made, if the parties were now let in to plead to the original action, or to the *scire facias*. Both judgments being regular and no defence sworn to, the motion must be denied with costs. Rule accordingly.

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ALBERT G. STONE *et al.* agt. ELIJAH SMITH.

A judgment debtor may redeem premises sold at a sheriff's sale, by the payment of property or securities *other than money*, where it is agreed to be received for such purpose by the purchaser.

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Stone agt. Smith.

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*April Term, 1846.*

MOTION by defendant to set aside or vacate a sheriff's deed.

On the 26th of March, 1844, all the interest of the defendant, Elijah Smith, in a farm of land in Tompkins county, was sold on an execution issued on a judgment docketed in the clerk's office of Tompkins county, October 6, 1841, in favor of the plaintiffs against the defendant, Elijah Smith, for \$147.65 cents, damages and costs. On the 24th February, 1843, Elijah Smith conveyed all his interest in the farm to his brother George W. Smith. On the sale of the farm by the sheriff of Tompkins county, on the 26th of March, 1844, the plaintiffs became the purchasers, for the amount due on their judgment. On the 25th of March, 1845, one day before the year expired, Elijah and George W. Smith made an arrangement with Stone, one of the plaintiffs, who had the principal management of the matter, to redeem the farm by giving Stone, in lieu of so much money, a note drawn by one Benjamin Smith, and indorsed by Cyrus Beers, for \$60, payable in six months; \$19 was allowed to Elijah Smith which had been paid by him to the attorney of the plaintiffs

\*before judgment, and the balance on the sale, Stone [\*118] agreed to take in *flax seed*, to be delivered to him after it should be harvested, by George W. Smith.

The Tompkins County Bank claimed to redeem the premises as assignees of a mortgage executed by Elijah Smith and Van Auken Smith, on the 8th of October, 1841, to one Wm. H. Mann, of New York, for the consideration of \$3,000; and also as the assignees of a judgment rendered against Elijah Smith in favor of Timothy S. Williams and Joseph E. Shaw, before a justice of the peace, on the 6th January, 1843, for \$28.16, damages and costs, and docketed in Tompkins county clerk's office, on the 9th January, 1843. The bank upon these incumbrances redeemed and took a deed from the sheriff, which was recorded, June 27, 1845.

It was shown by defendant's papers that the note given to Stone by the Smiths was paid at maturity, and the flax seed delivered or offered to be delivered to Stone in accordance



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Prince agt. Currie.

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with the previous arrangement, but Stone refused to receive them for that purpose, only on deposit until the question of redemption by the bank was settled.

The papers in opposition to the motion explained fully the manner in which the mortgage lien was created, and also the justices' judgment upon which the bank claimed to redeem.

The moving papers stated that the consideration for which the mortgage was given was in litigation in the court of chancery and yet undetermined, although it appeared from the papers that the vice chancellor had decreed the amount of the mortgage against the Smiths, and they had appealed to the chancellor.

There were also objections taken by Smith as to the regularity in point of form merely, as to the redemption by the bank.

S. B. CUSHING, *defendant's counsel*.

CUSHING & HUMPHREY, *defendant's attorneys*.

G. B. WALBRIDGE, *counsel for bank*.

B. G. FERRIS, *attorney for bank*.

BEARDSLEY, Justice. Motion granted on the ground suggested at the hearing, that is, that the judgment debtor duly redeemed the land sold. The judgment and mortgage alleged to be owned by the bank are still liens on the land, if they are valid, and the bank can proceed upon them to recover what is due.

Motion granted without costs to either party.

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[\*119] \*ALFRED S. PRINCE, Survivor of the late firm of  
Wm. Prince & Son, agt. WILLIAM CURRIE.

An order may be granted for the production of books and papers, to enable a plaintiff to furnish a proper *bill of particulars*.

A bill of particulars, for most purposes, is considered as a part of the pleading to which it refers. (*Starkweather agt. Kittle*, 17 *Wend.* 20; *Chrysler agt. James*, 1 *Hill*, 215.)



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McDonald agt. Brace.

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*April Term, 1846.*

MOTION for discovery of books and papers on an appeal from an order of circuit judge.

This was an action of assumpsit; declaration contained the common money counts. Plaintiff furnished a bill of particulars, which was decided to be insufficient on motion of defendant at February term, 1846, and judgment of non-pros ordered, unless plaintiff furnished a further bill.

Plaintiff then applied to the circuit judge of the first circuit for discovery of defendant's accounts with the firm of Wm. Prince & Son, in order to make a further bill of particulars; the application was denied, on the ground that the discovery sought was not within the 28th rule of this court, providing for the discovery of books and papers.

Plaintiff appealed from the order of the circuit judge to this court.

G. R. J. BOWDOIN, *plaintiff's counsel.*

WESTERN & EDWARDS, *plaintiff's attorneys.*

N. HILL, JR., *defendant's counsel.*

GEORGE BUCKHAM, *defendant's attorney.*

BEARDSLEY, Justice. The bill of particulars, for most purposes, is considered as a part of the pleading to which it refers, and the discovery sought is to enable the party to complete his declaration.

Motion granted.

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ANNA McDONALD agt. CHAUNCEY BRACE.

Where defendant, by injunction from chancery, restrains plaintiff's proceedings in the suit at law, *except to proceed to judgment*, and the plaintiff does not notice the cause for trial at the next circuit after service of the injunction; the defendant can not obtain judgment as in case of nonsuit for not noticing for the circuit. After service of the injunction it is at plaintiff's *election* to proceed to judgment or not.

*April Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

This was an action of ejectment, for premises in Niagara county. Plaintiff resided in Jefferson county. The suit was commenced in October last, and issue joined the 5th January last. On the 19th January, plaintiff was served by defendant with an injunction and subpoena from the court of chancery, staying all the proceedings in this cause *except to proceed to judgment*, and in February afterwards was served with a bill in chancery, for relief, &c. A circuit was held in Niagara, commencing on the 10th of March, and plaintiff's at-  
[\*120] torney \*did not notice the cause for trial, alleging that, by the terms of the injunction served, it was optional with the plaintiff, whether to proceed to judgment or not.

Defendant insisted that the plaintiff was bound to proceed to judgment, that the injunction did not stay him for that purpose.

A. TABER, *defendant's counsel.*

J. C. MORSE, *defendant's attorney.*

J. A. COLLIER, *plaintiff's counsel.*

N. B. HAWES, *plaintiff's attorney.*

BEARDSLEY, Justice. Denied the motion with costs, on the ground that it was at plaintiff's election to proceed to judgment or not, after the injunction was served.

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SAMUEL WHITNEY agt. HENRY SHUFELT.

Plaintiff's attorney is not in default for not noticing a cause for trial, where there is not sufficient time, between joining of the issue and the commencement of the circuit, to serve a notice *by mail*, the defendant's attorney residing distant from plaintiff's attorney, to wit, in another county. Plaintiff's attorney is not bound to make *personal* service in such a case.

There may be cases where a party would be bound to make personal service, as where he asks relief from a regular default, or seeks to take advantage of a technical irregularity without merits

*April Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

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Heath agt. Taylor.

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The venue in this cause was in Columbia. Issue joined 23d February, 1846. A circuit was held in Columbia, commencing on the 16th of March, 1846. Plaintiff's attorney did not notice the cause for trial, for the alleged reason that there was not sufficient time left to serve a notice by mail, after joining of the issue. Defendant's attorney resided at Valatia, Columbia county, and plaintiff's attorney resided at Albany—and there being but twenty-one days from the time of joining issue to the commencement of the circuit. Plaintiff's attorney stated that he had no correspondent or agent at Valatia, by whom he could make personal service on defendant's attorney.

J. A. COLLIER, *defendant's counsel.*

C. P. SCHERMERHORN, *defendant's attorney.*

N. HILL, JR., *plaintiff's counsel.*

C. H. BRAMHALL, *plaintiff's attorney.*

BRONSON, Chief Justice. There was not time to notice by mail. Plaintiff is not in default for omitting to send a special messenger or otherwise make personal service.

There may be cases where a party would be bound to make personal service, as where he asks relief from a regular default, or seeks to take advantage of a technical irregularity without merits.

Motion denied. The question being new, no costs are allowed.

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\*HIRAM HEATH agt. ROBERT TAYLOR. [\*121]

Notice of substitution of attorneys should be immediately given to the opposite attorney. Where substituted attorneys proceed and take a verdict in a cause, under a notice of trial given by the former attorney for plaintiff, no notice of substitution having been given to defendant's attorney, and it appearing that the former attorney for plaintiff had given defendant's attorney a *stipulation* to let the cause go over the circuit without prejudice, *after the notice of trial was served*; the verdict and all subsequent proceedings will be set aside with costs, as unauthorized, although the plaintiff and the substituted attorneys were ignorant of such stipulation.

*April Term, 1846.*

MOTION on the part of defendant to set aside verdict, judgment, &c.

A verdict was obtained in this cause in favor of the plaintiff, June 28th, 1844, and judgment entered April 23, 1845. Costs were taxed April 18th, 1845, without notice. Copy costs served on defendant's attorney, 25th of August, 1845, which was the first knowledge defendant's attorney had of the verdict. It appeared on the part of the defendant that plaintiff's attorney, L. J. Lansing, Esq., personally served a notice of trial on defendant's attorney, on the 31st May, 1844, for the June circuit in Steuben, to be held on the 24th of June, 1844. On the 12th of June, 1844, Lansing gave defendant's attorney a stipulation that the cause should go over the June circuit, 1844, without prejudice; that after the 12th of June, 1844, defendant's attorney alleged that he never heard, directly or indirectly, that any proceeding had been taken in the cause by either party, until the 25th of August, 1845, when he received a copy of a bill of costs, and notice accompanying it, that Johnson & Covell, Esqrs., had been substituted as attorneys for plaintiff, in the place of L. J. Lansing, Esq.

Defendant's attorney served papers for this motion for December special term last, which was put over by consent to February special term, and finally abandoned, for the reason that news had been received of the death of defendant in July last, who at the time of his death resided in Illinois. On the 21st of March last, Christopher Hewitt was appointed administrator of the defendant, and employed defendant's attorney to proceed with this motion. It appeared on the part of the plaintiff, that L. J. Lansing, Esq., on the 31st May, 1844, gave to plaintiff a stipulation substituting Johnson & Covell, of Steuben county, attorneys for the plaintiff, after that Lansing alleged he had had no charge or control of the cause, that soon after the June circuit, 1844, M. I. Townsend, Esq., law partner of defendant's attorney, inquired of him (Lansing), whether a verdict had been taken in the cause, as he had

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Charles agt. Waterman.

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heard there was a report of that kind made by plaintiff, Lansing informed him that he had given the papers to Johnson & Covell, who had charge of the suit, that he had \*not heard from them or the plaintiff since the [\*122] circuit, and that he had no information on the subject.

Afterwards, in the spring of 1845, he told defendant's attorney that Johnson & Covell had been substituted as attorneys in his place, and that defendant's attorney had better write to them or the clerk of Steuben county, and ascertain whether a verdict had been taken in the cause; that he (Lansing) had nothing more to do with it. Plaintiff stated that he took the papers in the cause and subpoenas from L. J. Lansing, Esq., on the 20th of June, 1844, and also a stipulation signed by Lansing, substituting Johnson & Covell, as his attorneys in the cause; that he received no information from Lansing that any stipulation had been given or any arrangement made to let the cause go over the circuit; that soon after the verdict was taken, plaintiff was at West Troy, and informed the defendant and Hewitt (who was afterwards administrator of defendant), and others, of the verdict in the cause.

N. HILL, JR., *defendant's counsel.*

R. M. TOWNSEND, *defendant's attorney.*

M. T. REYNOLDS, *plaintiff's counsel.*

JOHNSON & COVELL, *plaintiff's attorneys.*

BRONSON, Chief Justice. The trial was wholly unauthorized, and we can not say upon the papers that the objection has been waived.

Motion granted, with costs.

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GEORGE CHARLES agt. ROBERT WATERMAN.

Where the real plaintiff resides out of the state, and the demand belongs out of the state, and the plaintiff to the record resides within the state, the plaintiff to the record is bound to file security for costs.

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Bangs agt. Avery.

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*April Term, 1846.*

MOTION by defendant that plaintiff file security for costs.

Plaintiff's attorney gave notice to defendant's attorney, and served it with the declaration, that the demand for which this suit was brought, and all claims either in law or equity which the plaintiff had against the defendant on the 8d day of June, 1844, were on that day sold, assigned and transferred by the plaintiff to A. P. Richardson and J. C. Burrage, and that this suit was brought for the benefit of Richardson & Burrage.

Defendant's papers showed that Richardson & Burrage were doing business in the city of Boston as a firm, and that they resided in the state of Massachusetts.

Plaintiff's counsel insisted that where the real plaintiff resided out of the state, *and the demand belonged out of the state*, as in this case, that the plaintiff was not bound to file security for costs.

[\*123] \*D. WRIGHT, *defendant's counsel.*

H. C. WHELPEY, *defendant's attorney.*

A. WORDEN, *plaintiff's counsel.*

F. M. HAIGHT, *plaintiff's attorney.*

BEARDSLEY, Justice. Granted the motion, costs to abide the event, on the ground that Richardson & Burrage were the parties in interest, and they, being non-residents, were bound, under the former decision of this court, to file security for costs.

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ISAIAH BANGS *et al.* agt. ELIAS AVERY.

Where a plaintiff asks leave to reply several matters to a special plea—bankrupt's discharge, &c.—he should set out *particularly* what those matters are.

*April Term, 1846.*

MOTION by plaintiffs for leave to reply several replications to the plea of bankrupt's discharge, pleaded by defendant Elias Avery.



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Humphrey agt. Gansevoort.

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The plaintiffs stated that they were desirous to set up various acts of fraud on the part of the defendant Avery in his discharge, in bar to his plea; that he fraudulently and wilfully concealed, and fraudulently and wilfully omitted to include in his inventory of his property, certain property and rights of property, real and personal, of great value, and that he fraudulently and wilfully concealed the same from the assignee appointed by the district court, in his proceedings to obtain his discharge, which property and rights of property he (Avery) owned or had a beneficial interest to a large amount, as plaintiffs were informed and believed, and fully expected to prove on the trial of the cause.

J. EDWARDS, *plaintiffs' counsel.*

S. MATTHEWS, *plaintiffs' attorney.*

A. TABER, *defendant's counsel.*

L. FARRAR, *defendant's attorney.*

BEARDSLEY, Justice. Denied the motion, with costs, without prejudice, on the ground that the plaintiffs did not state particularly what matters were sought to be replied. The affidavit was not full enough.

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HUMPHREY & LANSING agt. JOHN R. GANSEVOORT.

Where defendant moves on *twenty* witnesses to change the venue, without showing *specialty* why they are material and necessary; and the plaintiff states that *three* witnesses are material for him, and shows *why* they are material and necessary, the venue will be retained.

*April Term, 1846.*

MOTION by defendant to change venue.

Defendant moved on an affidavit containing the names of *twenty* witnesses as material and necessary for his defence, and to change the venue from the county of Albany to the county of Steuben. Action; assumpsit; defendant stated in his \*affidavit that if the plaintiffs claimed to have [\*124] more than two witnesses residing in the county of

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Miller agt. Hooker.

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Albany where the venue was laid, all of them over two were material for the plaintiffs only to prove the value of certain articles of property sold by the plaintiffs to the defendant, which could as well be proved by witnesses residing in the county of Steuben; no special circumstances were shown or reasons given, why twenty witnesses were necessary for defendant in his defence to the suit.

Plaintiffs stated that they were hardware merchants in the city of Albany, and that the suit was brought to recover for several bills of goods sold at different times during the years 1843 and 1844, in the city of Albany, amounting in all to \$1,500; that *three* witnesses were material and necessary for the plaintiffs on the trial of this cause, &c.

D. WRIGHT, *defendant's counsel.*

R. B. VAN VALKENBURGH, *defendant's attorney.*

R. L. JOICE, *plaintiffs' counsel.*

C. W. CAMPBELL, *plaintiffs' attorney.*

BEARDSLEY, Justice. No reasons are shown why twenty witnesses are necessary for defendant. Plaintiffs show why three are necessary for them; the venue must be retained.

Motion denied.

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JACOB F. MILLER agt. JAMES H. HOOKER.

A defendant not a party to the record, but is the real defendant and party in interest in the suit, can make an affidavit of merits, to prevent an inquest. An inquest will be set aside where such an affidavit of merits is filed and served before the inquest is taken.

*April Term, 1846.*

MOTION by defendant to set aside inquest.

Issue was joined in December last; the cause was noticed for trial for the last January circuit, in Albany. It appeared from defendant's papers that Hooker was defendant *nomi-*  
*nally*; that Cornelius Schermerhorn was the real defendant



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Miller agt. Hooker.

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and party in interest in the suit ; before the cause was called, one of defendant's attorneys informed plaintiff's attorney that he had sent an affidavit of merits to the defendant Hooker to have him sign and swear to, and to return; which he expected soon, and requested plaintiff's attorney not to take an inquest, if the cause should be called before the affidavit arrived. Plaintiff's attorney signified his intention to take an inquest in the cause when it was called, unless an affidavit of merits was filed ; defendant's attorney then procured an affidavit of merits from Schermerhorn, the *defendant in interest*, and filed it and served a copy on plaintiff's attorney. Plaintiff's attorney disregarded the affidavit and took an inquest. The \*affidavit was special, and stated that Hooker was [\*125] absent from the city and county of Albany, that it would be difficult to obtain from him an affidavit of merits in time to prevent an inquest ; that although Hooker was the defendant upon record, yet " that he (Schermerhorn) was the defendant in interest and was fully acquainted with the facts and circumstances of the cause, and that he had fully and fairly stated the case to his counsel, &c."

Plaintiff's counsel insisted that the affidavit of merits should have been made by the defendant on record, or his attorney, to be valid, and cited *Burrill's Practice*, 214.

H. HARRIS, *defendant's counsel*.

HARRIS & SHEPHARD, *defendant's attorneys*.

R. H. NORTHPROP, *plaintiff's counsel and attorney*.

BEARDSLEY, Justice. Held, the affidavit sufficient. Schermerhorn swore that he was the real defendant and party in interest.

Motion granted, costs to abide the event.

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SAMUEL FROST *et al.* agt. JACOB B. FLINT, imp'd, &c.

Where a motion is made to set aside a declaration served in a cause, on the ground that it was not filed before it was served, and the motion is denied on the merits with costs, and no leave given to renew, it does not preclude the party from afterwards moving to set aside a default and subsequent proceedings in the cause, where the time of filing the declaration is the ground of the motion for setting aside the *default*, and is the same point which was relied on in the former motion.

It is irregular and *improper* for an officer to sign a judgment record *in blank*; that is, before the amount of damages and costs, &c., inserted in it.

*April Term, 1846.*

MOTION by defendant Flint to set aside default and subsequent proceedings.

In this case a motion was made at the last special term, held in February, on behalf of Flint, to set aside the declaration served in this cause, on affidavits tending to show that the declaration was not filed until 11th of December, 1845, whereas it was served on the evening of the 10th. The motion was opposed on affidavits showing that the declaration was sent by mail from Fort Plain to Utica, on the 10th, in a letter, which letter was returned on the 11th, with a memorandum purporting to have been signed "J. L. Beardsley," stating that the declaration was filed on the 10th. The original memorandum and letter to Mr. Beardsley was annexed to the opposing papers. The chief justice denied the motion with costs, and no leave was given to renew it. The plaintiff afterwards proceeded in the cause, and entered the [\*126] default of Flint for not pleading. \*Defendant's papers showed that the judgment record in this cause was signed by the officer *in blank*, as to the amount of damages; that it was dated and signed on the 4th February, and the damages assessed on the 6th of February, and the rules for judgment entered on the 6th, and the date of the signing was altered from the 4th to the 6th, by some person other than the officer who signed it.

The defendant's counsel moved to set aside the default, on

the ground that the declaration was not filed until the 11th of December, and he produced a certificate signed by J. L. Beardsley, stating that the declaration was not filed until the 11th of December.

Plaintiff's counsel opposed the motion, and produced the papers used on the former motion, and relied on them, together with the decision then made by the chief justice, as an answer to the present motion. He said this decision necessarily determined that the declaration was in point of fact filed on the 10th of December, and until that decision was reversed, or leave given to renew the motion, the declaration must be deemed served on the 10th and not on the 11th. Besides, the certificate of the clerk had been produced, on both sides, and the papers showed that the declaration was probably received at the clerk's office on the 10th, and that was a sufficient *filing* within the meaning of the statute, though not marked filed until the next day.

D. WRIGHT, *defendant's counsel.*

J. WENDELL, *defendant's attorney.*

N. HILL, *plaintiffs' counsel.*

H. ADAMS, *plaintiffs' attorney.*

BEARDSLEY, Justice. Set aside the default as irregular, saying that though the chief justice had refused to set aside the declaration, he had not decided the present question, viz. : whether the declaration was filed in such a manner that a default could be entered in the suit. He said he believed from all the papers produced, that the declaration was not filed till the 11th of December, and therefore the default was irregular. He also stated that it was irregular and *improper* for any officer to sign a judgment record in blank ; that, if such had been the practice to any extent, it was high time that it should be stopped.

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Sandland agt. Adams.

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AUGUSTUS P. PHELPS agt. ELIHU WASSON and EPHRAIM  
McKEE.

Where a notice of motion to change the venue asks for costs, costs will be allowed plaintiff for appearing to oppose the motion.

*April Term, 1846.*

THIS was a motion by defendant to change the venue from the county of Chemung to the county of Cattaraugus. The defendants asked for \*costs in their notice of motion. Plaintiff's counsel did not oppose the motion, otherwise than to ask for costs against defendants, for being compelled to attend to prevent costs being taken against plaintiff by default.

M. T. REYNOLDS, *defendants' counsel.*

M. B. CHAMPLIN, *defendants' attorney.*

N. HILL, JR., *plaintiff's counsel.*

E. & G. E. QUIN, *plaintiff's attorneys.*

BEARDSLEY, Justice. Granted the motion: the defendants to pay \$7 costs for opposing. •

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JOHN SANDLAND agt. EDSON ADAMS.

Where the venue in an affidavit is laid in one county, and the officer who takes it resides in another; held bad, for want of jurisdiction. (2 *Howard's Practice Reports*, 86.)

*April Term, 1846.*

THIS was a motion by defendant to set aside an inquest and subsequent proceedings. A similar motion was made in February last, which was denied with \$7 costs, without prejudice. The affidavit, which showed the reasons of defendant's default for not trying the cause, &c., was made by the attorney for the defendant, and was entitled "Westchester



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Mack agt. McCullock.

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county," but was sworn to before Wm. C. R. English, a commissioner of deeds who was appointed for and resided in the city and county of New York.

Plaintiff's counsel cited 2 *Howard's Practice Reports*, 86.

M. T. REYNOLDS, *defendant's counsel*.

G. MILES, *defendant's attorney*.

J. EDWARDS, *plaintiff's counsel*.

YORK & COOK, *plaintiff's attorneys*.

BEARDSLEY, Justice. Denied the motion with \$7 costs, without prejudice, on the ground that the venue in the affidavit being Westchester county, and the officer residing in the city and county of New York, *had no jurisdiction*.

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WILLIAM C. MACK agt. DANIEL McCULLOCK.

It is necessary for an officer, who is sued as such, to make application to the court for double costs, where he succeeds in the suit; only single costs of the motion will be allowed.

*April Term, 1846.*

MOTION by defendant for double costs.

This was an action of replevin against the defendant as a general deputy sheriff. In February last judgment as in case of nonsuit was obtained by defendant, and the value of the property assessed upon a writ of inquiry.

Plaintiff's counsel objected: 1st, that no motion for double costs was \*necessary; that defendant's [\*128] notice showed him to be an officer, and the pleadings should have been presented to the taxing officer, and double costs taxed of course. 2d, he should not ask for costs of this motion, and, if any, only single costs.

A. K. HADLEY, *defendant's counsel*.

D. N. BURNHAM, *defendant's attorney*.

J. EDWARDS, *plaintiff's counsel*.

C. D. WRIGHT, *plaintiff's attorney*.

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Brown agt. Ferguson.

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BEARDSLEY, Justice. This application was necessary, and of course carries costs, but single only.

Motion granted with \$10 costs.

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CLARISSA BROWN agt. SAMUEL S. FERGUSON.

A *letter, proposing* to tax a bill of costs in a cause before a certain officer at his office on a certain day and hour, is not a *notice of taxation*. A *relaxation* on such information is irregular.

*April Term, 1846.*

MOTION by defendant for retaxation of costs.

Plaintiff's attorneys served on defendant's attorney notice of retaxation of the plaintiff's bill of costs in this cause, on the 10th of March last for the 16th of March, before Samuel F. Reynolds, Esq., supreme court commissioner at Sing Sing, Westchester county. Defendant's attorney attended at the time and place noticed to oppose the taxation, and there met one of the plaintiff's attorneys, Mr. Briggs. Mr. Reynolds the commissioner was absent in the city of New York, and did not return by 4 o'clock, P. M., when defendant's attorney left. Mr. Briggs proposed to defendant's attorney to have the costs retaxed before Mr. Hallett in New York, on a day thereafter to be fixed between the defendant's attorney and Mr. Lee, one of plaintiff's attorneys, who was to attend the taxation. Defendant's attorney assented to that proposition, and they left Sing Sing for their respective residences. On the 17th of March, defendant's attorney received from Mr. Lee, one of plaintiff's attorneys, a letter dated 12th March, proposing to retax the costs before Mr. Reynolds at Sing Sing, on the 23d March. Defendant's attorney observed the letter was dated before the interview he had with Mr. Briggs, and supposed that Mr. Lee, on hearing the arrangement to have the costs taxed by Mr. Hallett, would again notice the costs for retaxation, that he did not regard the letter as a notice of retaxation. The letter read as follows: "Owenville, 12th

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Hill agt. Russell.

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**March, 1846.** J. W. Tompkins, Esq. Dear Sir—I have just received information of Mr. Reynolds that he will be in New York on Monday; on hearing from Mr. Clapp, to-day that you will oppose on retaxation of the costs in Brown agt.

Ferguson, \*I hasten to apprise you, in the hope that [\*129] you may receive this in time to avoid a bootless journey through the mud. We now propose to retax the plaintiff's costs in Brown agt. Ferguson before Mr. Reynolds at his office in Sing Sing, on Monday week, the 23d instant, at 12 o'clock, m. Yours, &c., Thomas R. Lee."

On the 28th March, defendant's attorney learned that plaintiff's attorneys, had the costs retaxed before Mr. Reynolds; on the 23d March, no one appearing to oppose, they were taxed at the full amount.

Plaintiff's counsel insisted that the letter was a sufficient notice of retaxation to defendant's attorney.

J. W. TOMPKINS, *defendant's counsel and attorney.*

A. TABER, *plaintiff's counsel.*

LEE & BRIGGS, *plaintiff's attorneys.*

BEARDSLEY, Justice. Granted the motion, with \$10 costs. The letter *proposing* a day of taxation was not a *notice* of taxation, the retaxation was irregular.

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JACOB P. HILL *et al.* agt. ISAAC F. RUSSELL.

Where plaintiff swears to the truth and materiality of several matters sought to be replied double, he will be allowed thus to reply, although such replication might be considered bad on demurrer.

*April Term, 1846.*

MOTION by plaintiffs for leave to reply double to the defendant's special plea of bankrupt's discharge.

First, a promise made by the defendant to the plaintiffs, to pay the debt or demands for the recovery of which this suit was brought, subsequent to the time the defendant's bankrupt's

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Romeyn agt. King.

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discharge was granted. Second, that the debt or demands or some part thereof, for the recovery of which this suit was brought, was created while the defendant was acting in a fiduciary capacity, and that the debt or demands were not mentioned in any of the defendant's papers in his proceedings in bankruptcy, and the plaintiffs were not named therein as creditors of defendant; that the plaintiffs were not served with any notice of defendant's proceedings in bankruptcy, or with any notice of the defendant's petition or application for his discharge as a bankrupt, although the defendant well knew the place of residence of the plaintiffs. Plaintiffs' affidavits stated the above matters as facts, and alleged their materiality by way of replication.

Defendant's counsel objected: 1st, that plaintiffs must show the necessity of applying to this court for such leave. [130] 2d, there was no consideration \*of the subsequent promise, and if defendant was not discharged as to the claim of plaintiffs, it was all they required to show.

J. H. COLLIER, *plaintiffs' counsel.*

R. BALCOM, *plaintiffs' attorney.*

R. H. NORTHPROP, *defendant's counsel.*

ARMSTRONG & FLY, *defendant's attorneys.*

BEARDSLEY, Justice. Granted the motion, costs to abide the event, and suggested that on demurrer the validity of the pleas might be questioned, but would not decide as to that, the affidavit to the materiality of these separate matters was sufficient.

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HERMAN M. ROMEYN agt. CHARLES KING.

Where an incredible number of witnesses are sworn to by a defendant to change the venue, the motion will be denied with costs on his own papers.

*April Term, 1846.*

MOTION by defendant to change the venue from the county of Ulster to the city and county of New-York.



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Marvin agt. Van Hoesen.

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It appeared that the action was libel. Defendant swore to *one hundred and forty-three* witnesses, residing in the city and county of New-York, as necessary, &c., and showed no special circumstances. Plaintiff's counsel cited 1 *Howard's Practice Reports*, 132.

CHARLES H. RAPALLO, *defendant's counsel and attorney.*

M. T. REYNOLDS, *plaintiff's counsel.*

M. SCHOONMAKER, *plaintiff's attorney.*

BEARDSLEY, Justice. Denied the motion, with costs, and stated that it was against all experience that so many witnesses were necessary in an action of libel, and, without looking at the papers on the other side, he should deny the motion, with costs.

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FRANCIS I. MARVIN *et al.* agt. LAMBERT VAN HOESSEN.

An appeal from the circuit judge, under the statute of 1841, is subject to the practice of the special terms, and should be brought to a hearing at the next special term (where there is time), after the appeal is taken.

*April Term, 1846.*

AN appeal by defendant on a motion from decision of circuit judge.

On the 13th of May, 1842, the defendant made a motion before Judge KENT, circuit judge of the 1st circuit, to set aside an execution issued against him by plaintiffs. The circuit judge denied the motion, and the defendant appealed, but had never prosecuted his appeal to a hearing until the present time.

\*E. SANDFORD, *defendant's counsel.*

[\*131]

R. MOTT, *defendant's attorney.*

WM. COIT, *plaintiffs' counsel and attorney.*

BEARDSLEY, Justice. Held, that appeals from the circuit judge, under the statute of 1841, were not calendar causes, but

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Perine agt. Blackford.

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were subject to the practice of the special terms, and the party appealing was bound to bring his appeal to a hearing at the next special term after it was taken.

Motion was therefore denied with costs.

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MOSES B. PERINE agt. EDWARD BLACKFORD.

Where a general demurrer to plaintiff's declaration is served in time, and the plaintiff's attorney disregards it, for the reason that the defendant had promised to pay the demand, and threatened plaintiff to keep him out of it a longer time than he asked to pay it in, if he sued it, and that it was a trick and effort for delay, on the part of the defendant, and goes on and enters default and perfects judgment; such proceedings will be set aside, with costs; the demurrer being regularly served, the reasons are not sufficient to warrant plaintiff in treating it as a nullity.

*April Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings.

On the 11th of February, 1846, defendant was served with declaration in this suit. On the 2d day of March, a demurrer to plaintiff's declaration was duly served on plaintiff's attorney by mail, together with notice of retainer from defendant's attorney. On the 9th of March, defendant's attorney received a letter from plaintiff's attorney (postage unpaid), saying, "I decline receiving the copy demurrer in this cause, and have entered default, &c., therein. I will return the copy demurrer to you if you wish." On the 5th of March, plaintiff's attorney entered default and perfected judgment.

Plaintiff's counsel insisted they had a right to disregard the demurrer, for the reason that it was solely an effort for delay, and a trick to keep plaintiff out of his demand, and came within the decision in *4 Hill*; they had shown defendant's admissions to pay the note upon which the suit was brought, and his threats made at the same time, that, if plaintiff sued it, he (defendant) would keep him out of it a longer time than what he asked to pay it in.

Methodist Episcopal Church in the village of Little Falls *vs.* Tryon.

H. H. MARTIN, *defendant's counsel.*  
 J. S. BOSWORTH, *defendant's attorney.*  
 E. H. ROSEKRANS, *plaintiff's counsel.*  
 M. W. PERINE, *plaintiff's attorney.*

BEARDSLEY, Justice. The demurrer must be held regularly served, the only question is, whether the acts of the defendant were such that it made it a nullity, he thought not.

Motion granted with costs.

\*THE METHODIST EPISCOPAL CHURCH in the village [\*132]  
 of Little Falls *agt.* NORMAN TRYON.

A commissioner's order staying plaintiff's proceedings, *after report of referees*, is void within the meaning of the 97th rule.

A *report of the referees* is equivalent to a *verdict* within the statute. (2 R. S. p. 209, § 20.) A defendant made a case to review a report of referees, served notice of settlement within the four days allowed by the rule for that purpose, but fixed the day of settlement *more than twenty days from the day of service*. After twenty days from the day of service, the plaintiff perfected judgment, issued execution and levied (the commissioner's order, if it had been valid, only stayed plaintiff's proceedings, *by its terms*, until the case was settled).

*Held*, that the case became settled by force of the rule of this court, *at least* after the expiration of twenty days from the day of serving notice of settlement.

*April Term, 1846.*

MOTION by defendant to set aside execution and judgment, and to have case settled and argued.

This cause was an action of assumpsit, and referred by consent to three referees, who made their report in favor of the plaintiffs, on the 18th of December last. A copy of the report was served on defendant's attorney December 20th. On the 30th of December, defendant's attorney served on plaintiff's attorneys, papers, case and notice of motion, on which to move to set aside the report; at the same time served an order of a *supreme court commissioner*, staying all plaintiff's proceedings after filing the report, and entering rule for judgment, until the case was settled by the referees, and two days thereafter.



Methodist Episcopal Church in the village of Little Falls agt. Tryon.

The case and papers were verified by affidavit. On the 22d of January, plaintiff's attorneys served on defendant's attorney proposed amendments—time for that purpose had been extended to January 25th. On the 24th of January, defendant's attorney served on plaintiff's attorneys a notice of the settlement of the case, and amendments by the referees, for the 16th of February then next. Defendant's attorney gave as a reason for fixing the time so long, that the common pleas commenced its session in Herkimer county on the first Monday of February, and usually occupied two weeks or more; and the law member of the referees was district attorney, and the attorneys for both parties had more or less business before that court, &c. On the 30th of January, plaintiff's attorneys served on defendant's attorney a notice, in substance, that they should object to the settlement of the case by the referees, for the reason that the day of settlement fixed by defendant's attorney was more than twenty days after the time of serving notice of settlement; and as more than four days had expired after the service of the proposed amendments by them, they should consider the case as settled by the plaintiff's amendments. The referees refused to settle the case on the [\*133] objections made by plaintiff's attorneys. \*On the 4th of February, plaintiff's attorneys entered up judgment, and on the 12th of March issued execution.

M. T. REYNOLDS, *defendant's counsel.*

L. FORD, *defendant's attorney.*

E. S. CAPRON, *plaintiff's counsel.*

CAPRON & LAKE, *plaintiff's attorneys.*

BEARDSLEY, Justice. Held, the commissioner's order void, under the 97th rule; that a report of referees was equivalent to a verdict within the statute (2 R. S. p. 209, § 20); and that the case became settled by force of the rule of this court, at least after the expiration of twenty days from the day of service of notice of settlement, and the plaintiff's proceedings were, therefore, regular, but permitted the defendant on terms

Burckle agt. Luce.

to have the case settled by the referees, and to argue it; the judgment, execution and levy to stand as security, unless he gave a bond with approved security to pay the judgment, if sustained, in which case the execution and levy on the goods of defendant was to be set aside, but the judgment to stand.

Rule accordingly.

CHRISTIAN J. BURCKLE *et al.*, ex'rs, &c., of Charlotte Leitz,  
deceased, agt. STEPHEN LUCE.

Where a sheriff retakes personal property of an intestate, by virtue of a levy made in his lifetime, and the property at the time of such retaking is in the possession of his executors; and the executors bring an action of replevin against the sheriff for such retaking, and the sheriff succeeds in the final event, he is entitled to double costs under the statute; the action is *not necessarily brought by the plaintiffs as executors.*

*April Term, 1846.*

MOTION by defendant for double costs.

Defendant was a deputy sheriff of Oswego county. In January, 1840, he received a *fieri facias* in favor of Philander Rathbun, against one of the plaintiffs, Christian J. Burckle, and levied upon household furniture in the possession of Burckle. Charlotte Leitz (mother-in-law of Burckle, then living in his house) claimed the property, and brought an action of replevin, which was tried, and verdict rendered for defendant (Luce). Mrs. Leitz moved for a new trial on a bill of exceptions, which was granted, and before the cause was again tried, and while it was pending, the suit abated by the death of Mrs. Leitz, which took place in the early part of February, 1842. Some months after her death, in the summer of 1842, Luce, the defendant, retook the property by virtue of his previous levy, for which retaking this suit was brought. Defendant stated that during all this time he was a duly appointed deputy sheriff. This cause was brought to trial at the Oswego \*circuit for June, 1843, when plaintiffs' counsel [\*134] objected to defendant's proof, on the ground that the

sheriff had no right to retake the property by virtue of his former levy, inasmuch as the abatement of the former replevin suit, by the death of Mrs. Leitz, did not revest the title to the property in the sheriff, which objection was sustained at the circuit; afterwards this court granted a new trial.

The cause was again brought to trial at the Oswego circuit, 1845, and tried on the merits, and a verdict rendered for the defendant Luce, the value of the property assessed at \$574. Defendant's damages for the detention, at \$172.20, and the amount due on the defendant's execution found to be \$826.74. Plaintiffs moved for a new trial on a bill of exceptions, at the last January term, which was denied. It was insisted by plaintiffs' counsel that the suit was necessarily brought by the plaintiffs, in their official character as executors, therefore, *no costs* should be given against them.

E. B. TALCOTT, *defendant's counsel.*

TALCOTT & HARMON, *defendant's attorneys.*

H. H. MARTIN, *plaintiffs' counsel.*

DUER & BABCOCK, *plaintiffs' attorneys.*

BEARDSLEY, Justice. Granted the motion, on the ground that the action was brought against the defendant as a public officer, and was *not* necessarily brought by the plaintiffs as executors; the property being in their possession, they could bring an action of wrong for the taking, or for trespass, in their individual capacity.

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ANDREW C. HULL *et al.* agt. WILLIAM T. WALLIS.

Motion to change the venue will be denied with costs, where it appears the defendant's default has been entered.

*April Term, 1846.*

MOTION by defendant to change the venue.

Defendant moved to change the venue from the county of Allegany to the city and county of New-York.

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Crary agt. Oliver.

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Plaintiffs produced a certificate of the clerk of this court, dated 18th March last, by which it appeared that defendant's appearance and default was entered on that day.

A. H. WALLIS, *defendant's counsel and attorney.*

J. A. COLLIER, *plaintiffs' counsel.*

L. C. PECK, *plaintiffs' attorney.*

BEARDSLEY, Justice. Denied the motion with costs, on the ground that defendant's default had been entered.

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\*JOHN CRARY agt. WILLIAM OLIVER. [\*135]

Where defendant served a *supreme court commissioner's order* staying plaintiff's proceedings *after notice of trial*, in order to move to change the venue, and plaintiff disregarded it and went on and took an inquest; *held*, that the inquest was regular. Defendant, however, was permitted to come in on terms.

*April Term, 1846.*

MOTION by defendant to set aside inquest and subsequent proceedings.

After notice of trial, defendant's attorney served on plaintiff's attorney an order, granted by a *supreme court commissioner*, staying all plaintiff's proceedings, until the decision of a motion thereafter to be made to change the venue; the motion to change the venue was made and denied, on the ground that the plaintiff had taken an inquest in this cause. Plaintiff took an inquest, regarding the commissioner's order staying proceedings as a nullity under the 97th rule.

R. W. PECKHAM, *defendant's counsel.*

A. P. GRANT, *defendant's attorney.*

M. FAIRCHILD, *plaintiff's counsel and attorney.*

BEARDSLEY, Justice. Plaintiff's inquest is regular, defendant may be let in on terms. Motion granted on payment of costs of inquest and subsequent proceedings, and seven dollars costs of opposing motion.

## MARTIN STOVER agt. CHRISTOPHER BATTERMAN, sheriff, &amp;c.

Where defendant's attorney receives a stipulation from plaintiff's attorney to try at a stated circuit, and gives admission of service, and retains the stipulation, he cannot succeed on a motion for judgment as in case of nonsuit for not trying the cause at an *intervening adjourned circuit*.

*April Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

Plaintiff's attorney noticed the cause for trial at the Albany circuit, for October, 1845. On the 4th of October (previous to the circuit), he served on defendant's attorneys a notice of countermand, and a stipulation to bring on the trial of the cause at the circuit, in April, 1846, and to pay defendant's costs of preparing for trial at the October circuit, which service was admitted by defendant's attorneys, and their costs subsequently paid. In January, 1846, an adjourned circuit was held in Albany, at which the cause was not noticed for trial by plaintiff's attorney, for the reason that he did not know of such adjourned circuit until it was too late to notice the cause for trial.

Defendant moved for judgment as in case of nonsuit, for not bringing the cause to trial at the adjourned circuit held in January.

E. A. DOOLITTLE, *defendant's counsel.*

WHEATON, D. & HADLEY, *defendant's attorneys.*

O. ALLEN, *plaintiff's counsel.*

J. BOIES, *plaintiff's attorney.*

[\*136] \*BEARDSLEY, Justice. Denied the motion, costs to abide the event, on the ground that defendant's attorneys had accepted the stipulation to try at the April circuit. Plaintiff's attorney not knowing of the adjourned circuit in season to notice for trial, costs of motion were ordered to abide the event.



JOSEPH LOW agt. CALEB BARTLETT, imp'd, &c.

A charge for retaining fee, attorney and counsel, \$8, is not taxable in interlocutory costs, it belongs in the costs on the final determination of the suit.

*April Term, 1846.*

MOTION by defendant for retaxation of costs.

An order was granted in this cause at the February special term, by which the plaintiff had leave to amend his declaration, by declaring specially, on payment of defendant's costs up to the 12th of January last. Defendant's attorney made out his bill of costs, in which he charged, "retaining fee, attorney and counsel, \$8," which was not allowed by the taxing officer. Defendant's attorney appealed from the taxation on that item.

R. W. PECKHAM, *defendant's counsel.*

CROMWELL & NORTON, *defendant's attorneys.*

H. HARRIS, *plaintiff's counsel.*

W. H. TAGGARD, *plaintiff's attorney.*

BEARDSLEY, Justice. Denied the motion with costs, on the ground that the item of \$8, retaining fee, attorney and counsel, was not taxable in interlocutory costs, it belonged to the general costs of the cause, and should not be taxed until its final disposition.

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In the matter of ORRIN THOMPSON *et al.* agt. NATHAN P. ROCKWOOD *et al.*

NATHAN P. ROCKWOOD *et al.* agt. ORRIN THOMPSON *et al.*

An appeal from the order of a circuit judge, denying a motion to vacate a former order which is alleged to be a nullity, should bring before this court the original order alleged to be null and void, as well as the order appealed from.

The circuit judge of the first circuit has no power to grant a common law certiorari.

*April Term, 1846.*

MOTION by defendants in the second entitled cause to vacate an order of the circuit judge of the first circuit.

On the 13th of December last, an order was made by Judge EDMONDS of the first circuit, at a special term held by him, allowing a certiorari, to remove and bring before the circuit judge proceedings in the matter of N. P. Rockwood and H. D. Tuttle ads. Orrin Thompson *et al.*, under the "Act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831: instituted by O. Thompson *et al.*, before Michael ULSHOEFFER, first judge of the court

[\*137] \*of common pleas for the city and county of New-

York, against N. P. Rockwood *et al.* On the 31st day of January last, a motion was made before the circuit judge, on behalf of Orrin Thompson *et al.*, to vacate the order of the 13th December, and the certiorari thereupon issued, upon papers showing that Orrin Thompson resided out of the city of New-York, to wit, in the state of Connecticut; the affidavit of Thompson stated positively that he resided in Connecticut, and had for five years. It was also shown that George W. Niles, the attorney for Rockwood and Tuttle, resided in Brooklyn, in the county of Kings. Affidavits in opposition to the motion were read, denying the permanent residence of G. W. Niles in Brooklyn, and that he was a resident of the city of New-York; also, that Orrin Thompson's name appeared in the New-York city directory, for the years of 1835, 36, 41, 42, 43, 44, 45, as a resident of the city; and for several of those years his residence was put down in Anthony street, and that he carried on business at No. 8 Spruce street. The circuit judge, on his decision, remarked, that "he did not see how he could entertain the motion. It was predicated on the idea that Thompson was a non-resident of the city; if that was so, he had no jurisdiction to grant the motion; and if it was not so, then there was no reason for granting it, so that in either event it would have to be denied with costs." The rule was entered accordingly on the 16th of February last. An appeal was taken from the decision of the circuit judge of the

16th of February, and brought on to argument at the present special term.

J. EDWARDS, *counsel for motion.*

WM. S. SEARS, *attorney for motion.*

R. W. PECKHAM, *counsel opposed.*

GEO. W. NILES, *attorney opposed.*

BEARDSLEY, Justice. Denied the motion without costs to either party, on the ground that the appeal from the order of the 16th February last did not bring before the court the order of the 13th December, allowing the certiorari; and stated on the argument, that the circuit judge had no authority to allow the certiorari in the matter: it was a common law certiorari, and not provided for by the statute, and that in his opinion the certiorari was not of any force or effect.

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CORNELIUS C. COLEGATE *et al.* agt. SEYMOUR N. MARSH.

An affidavit of merits *for the motion* must be served and produced on a motion by defendant to set aside default: the original affidavit of merits accompanying defendant's plea will not answer. (See 1st *Howard's Practice Reports*, 166.)

*April Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings.

\*The defendant's plea and affidavit of merits annexed were served on the same day that his default had been entered by plaintiffs' attorney; but after the default had been actually entered, plaintiffs' attorney refused to accept the service, and returned them to defendant's attorney, stating that defendant's default had been entered. Defendant's papers for this motion contained a copy of the plea and affidavit of merits incorporated in an affidavit of defendant's attorney, and also the original plea and affidavit of merits served, annexed, but did not contain any affidavit of merits

for the motion. Plaintiffs' counsel cited 1 *Howard's Practice Reports*, 166.

O. ALLEN, JR., *defendant's counsel.*

JOHN CUMMING, *defendant's attorney.*

H. HARRIS, *plaintiffs' counsel.*

W. H. TAGGARD, *plaintiffs' attorney.*

BEARDSLEY, Justice. Denied the motion with costs, without prejudice, on the ground that there was no affidavit of merits for the motion.

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RICHARD A. UDALL *et al.* agt. THE LONG ISLAND RAILROAD COMPANY.

Where the venue in a cause is laid in a county where there has been and still is great and extensive excitement in regard to the subject matter for which the suit is brought, and many of the citizens of the county are interested in the event, the venue on that account will be changed.

Where it appears that many of the inhabitants of an *adjoining* county are more or less interested in the subject matter of the suit, and have shared more or less in the excitement, the venue will not be changed to such county.

*April Term, 1846.*

MOTION by defendants to change the venue.

This suit was brought to recover of the defendants damages, alleged to have been sustained by the plaintiffs, by the burning of wood upon a certain tract of wood land of the plaintiffs, situated in the town of Islip in the county of Suffolk: damages laid in the declaration at \$10,000; the venue was laid in Suffolk county. Defendants stated that there were then pending in this court, against the defendants, two other suits for precisely like alleged causes of action; and that the aggregate amount of damages, laid in the declarations in this and the other suits, was \$31,000; and that each of the plaintiffs resided in the county of Suffolk, and that there were indictments against the defendants, for the burning of the same

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Udall agt. The Long Island Railroad Company.

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property, pending before the court of oyer and terminer of the county of Suffolk. Defendants stated that about forty miles of their railroad run through wood land in the counties of Suffolk and Queens; and such wood land, or a large portion of it, was owned in small lots or parcels by a great number of persons residing in various parts of the counties of Suffolk and Queens; that a \*fire occurred in [\*139] the woods in Suffolk and Queens counties, about the month of March, 1845, by which houses, barns, trees and woods, and other property to a large amount were consumed; and that defendants had been well informed and believed that public meetings had been held in the county of Suffolk, for the purpose and with the avowed object of adopting such measures as would enable the numerous persons, claiming to have been damaged by the fire, to recover their damages of the defendants, and that an agent had been appointed or authorized to solicit subscriptions or donations in money from the inhabitants of the county of Suffolk, for the purpose of defraying the expenses of one or more suits against the defendants, for damages sustained by the fire; that the persons who had commenced these suits were persons extensively known, and of extensive influence in the counties where they resided; that defendants were informed and believed that an opinion had been formed and expressed, and extensively circulated and believed by the inhabitants of those counties, that the defendants were liable to each and every of the plaintiffs in the several suits for all the damages which they had sustained by the burning of their woods and property, and that divers other persons residing in those counties had sustained damages by the burning of their woods and other property, for which they claimed to hold the defendants liable, and presumed they intended to commence suits against the defendants, in case the plaintiffs in these suits recovered. Defendants stated that previous to the actual location of their railroad, very many of the inhabitants of those counties were very desirous of procuring the location of the road to be made through their lands, and that when the road was finally lo-

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Udall agt. The Long Island Railroad Company.

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cated, many of the inhabitants expressed great dissatisfaction that the road was not located through their lands, and in consequence a strong and settled prejudice was formed, and then existed in their minds against the defendants.

Also, that a great degree of prejudice and hostility prevailed throughout those counties against the defendants, and that an organized attempt had been and was then making not only to compel the defendants to pay the amount of all damages sustained by the fires, but to compel them to discontinue the running of their locomotives over the road ; that, in pursuance of such design, publications of an inflammatory character, and designed and calculated to excite the inhabitants of those counties against the defendants, had been circulated in the counties ; that threats had been openly and publicly made, in various parts of the county of Suffolk, that the rails would be forcibly torn up from the defendants' road, [\*140] unless the \*locomotives discontinued running upon that portion of the road lying within the county of Suffolk. The public meetings mentioned were called for the express purpose of devising measures for carrying out the aforesaid designs ; that propositions for tearing up the rails from the road, and for obstructing the road, were openly and publicly discussed at their meetings, and resolutions were passed of a violent and denunciatory character against the defendants ; that some time in the month of May, 1845, after the occurrence of two fires, which consumed about five thousand acres of wood land, a meeting was called upon the line of the road, for the purposes and with the design to take measures to prevent the defendants from using the road ; about four hundred persons attended the meeting for the purpose ; while the meeting was assembled in an open and public manner, a locomotive with a train of cars attached appeared in sight coming towards the place where the meeting was assembled, and the persons assembled had reason to believe and know that a large number of passengers were upon the train, and the locomotive was moving so rapidly, that any obstruction, that should cause it to be thrown or directed from the

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track, would cause great destruction of life and property; it was proposed to the meeting, by a man of considerable influence in the county of Suffolk, that a certain switch or turnout, in the immediate vicinity of the place of meeting, should be turned or altered, so that the locomotive and train should be thrown off and directed from the track of the road; that the accomplishment of the design would inevitably have resulted in the loss of the lives of some of the persons upon the train; upon the proposition being made, those persons in favor of carrying out the plan were requested to move to a certain position, and a large majority of the persons assembled moved in accordance with such request, and thereby signified their approval of the proposition, and the proposition was about to be and would have been carried into effect, had not a few persons, who were present, interfered, and by very great efforts prevented it from being accomplished.

Defendants were credibly informed that in November last it was proposed to raise a force of two thousand men upon Long Island, to take up the rails of the road; and after the fires, portions of the rails of the road laid in the county of Suffolk had been upon two occasions torn up and forcibly removed from the railroad by persons or parties whose names were unknown, with the intent to obstruct the locomotive and cars passing over the road, and to embarrass the defendants in the prosecution of their business. Defendants stated that a bill had been filed \*in the court of chancery, [\*141] and was then pending, seeking to enjoin the defendants from the running of their locomotives. An indictment was also pending against the defendants, for a nuisance in running their locomotives through the county of Suffolk. In consequence of the road having been opened to Greenport, at the eastern part of Long Island, many persons in the counties of Suffolk and Queens, engaged in transportation by vessels, stages and other conveyances, and also tavern keepers and persons interested in tavern stands, had been arrayed in strong and determined hostility to the interests of the defendants, in consequence of the injury to a

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considerable extent of the business and employments of such persons, by means of such transportation and business being done on the railroad: and almost all the farms on Long Island had a portion of the wood land of the Island, and a portion of salt meadow belonging to their farms, either joining or at a remote distance from the farms; in consequence of the division of the wood land among the different land holders on the Island, almost every land holder or farmer had an interest in the preservation of the wood land, and the loss consequent upon the burning of any considerable extent of the wood land fell upon a great number of land holders in various parts of Long Island. And such was the spirit of hostility against the railroad company, throughout the counties of Queens and Suffolk, induced from various causes, that a fair and impartial trial of this cause could not be had in either of the counties of Suffolk or Queens.

A number of affidavits were produced by defendants, substantiating the facts as above detailed, and some important additional facts to show the hostility and excitement of the people in the counties of Suffolk and Queens against the railroad; one was that the defendants had a landing or station for the receiving or discharging of freight and passengers from their cars at Riverhead, and had at this station, in the month of August last, a pump and water tank, over which they had constructed a wooden building, and upon the other side of the track, opposite to the pump and water tank, had a large shed or building containing wood and various implements pertaining to their road; the locomotives of the company were accustomed to get supplies of wood and water at this station; and on Sunday night, the 31st of August last, the buildings of the company were entirely destroyed by fire. Soon after the fire a handbill or notice was found posted up at Riverhead, which read as follows: "Gentleman Fisk, look at this—this is a beginning. One cent reward and you shall know my name." George B. Fisk was president of the Long Island Railroad Company—upon investigation it was [\*142] generally believed that \*the buildings were set on fire



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by an incendiary; John Riley, a resident of Suffolk county, who was employed by the defendants, in the capacity of a night watchman, to guard and protect a certain portion of the railroad and bridges of the company lying within Suffolk county, stated that on the night of the 22d of August last he was stationed at a place in the town of Brookhaven called "Carman's River," for the purpose of protecting a bridge which the defendants had erected for the passage of their rail cars over the river; about one-half mile to the east of Carman's river, the defendants had erected a similar bridge over a ravine; this bridge was about twenty feet in height above the bottom of the ravine; the track of the road running over the ravine was supported by a large number of upright posts resting upon the ground below, being ranged in consecutive pairs, and constituted, with the string pieces and timbers of the track, the bridge upon which the rails were laid. About eleven and a half o'clock on the night of the 22nd of August last, he (Riley) heard a noise as of hammering and chopping with axes, which seemed to come from the direction of the ravine bridge; he hastened to the bridge, where he observed some men, to the number of about fifteen, engaged in striking upon the bridge; he challenged them, to which they replied, and soon afterwards he received a blow upon the back which struck him to the ground, and the musket with which he was armed was wrested from him; immediately he was lifted from the ground and taken by a guard of three men and forcibly removed from the spot; the men conducted him away from the bridge towards the westerly one near which he resided; they would not permit him to see their faces; and every attempt to look at them was followed by a blow from some one of them; they exhibited their arms to him, and each of them was armed with a double barreled gun; they then threatened his life if he ever should thereafter be found watching upon the track of the railroad again; they stated that if one hundred men could not cut down the bridge, two hundred would, and it would be dangerous to attempt to protect it. He (Riley) stated that it was with great difficulty

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he was enabled to give the alarm and timely notice to the trains of cars then coming from each end of Long Island, to prevent their running upon the bridge; and upon returning to the bridge, he discovered that four of the upright posts, forming two pairs of supporters, had been cut completely off with axes, the bridge was prevented from sinking down, merely by the bands of iron which were fastened to the longitudinal sills upon which the iron rails of the track were laid to hold the sills together at their ends, and a small [\*143] weight upon the \*bridge, in the part where the supporters were cut off, would inevitably have caused it to break off and sink down; and upon the same occasion about 200 feet of the track of the road, near the bridge cut off, were torn up and removed; there were noticed several wagons and horses at the bridge at this time, which were afterwards heard moving off at a great distance.

The moving papers contained the affidavits of twelve different individuals in Suffolk county, who stated that in their opinion a fair and impartial trial could not be had in this cause in the county of Suffolk, owing to the feeling of prejudice and hostility which prevailed throughout the county. Some of the affidavits stated the same in regard to Queens county.

On the part of the plaintiffs, affidavits were read in opposition to the motion; one of which was made by one of the plaintiffs, which stated that he was well acquainted with the sentiments of the people of the county of Suffolk towards the defendants, that there were undoubtedly many who disapproved of their conduct, in causing damages to the wood land through which their road run, and in many instances refusing to make any reparation therefor, but that a very large majority of the land holders in the county had not sustained any damage from the company, and he believed had no prejudice against them, and fully believed that a fair and impartial trial of the cause could be had in the county of Suffolk; and if the defendants should put the plaintiffs to the necessity of proving that the engines of the company had set fire to the plaintiffs'

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Udall agt. The Long Island Railroad Company.

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woods carelessly, and had thereby caused the damages of which they complained, they would be under the necessity of subpoenaing a large number of witnesses in their behalf; and the additional expense of trying the cause in Westchester county, or even in Kings county, would be very great, where (owing to the large number of causes that were usually on the calendar) they might be detained many days, and finally have to attend several circuits. Also stated that he was extensively acquainted in Queens county, and the people in that county appeared to be, and he believed were, generally friendly to the company; he was not aware nor did he believe that any damages had ever been sustained by the people of Queens county, by fires caused by the locomotives of the company; there was not to exceed two miles of country through which their road run in the county of Queens of at all a combustible character; with this exception, the road runs in that county through a cultivated or grazing country, and the people living on each side of the road were much benefited by the road; it afforded them great conveniences in sending their \*produce to market, &c.; and believed that jurors of [\*144] Queens county generally would act impartially on the trial of any cause in which the defendants were concerned, and a trial would be much more convenient for the witnesses and parties in the county of Queens, than in the county of Kings or Westchester, and the number of trials in Queens were generally small. Plaintiffs alleged that the principal object of defendants in changing the venue in this cause, was to delay and embarrass the plaintiffs in the prosecution of the suit. Plaintiffs produced and read the affidavit of John Willia, member of Assembly from Queens county during its last session, which stated that he was well acquainted with many of the inhabitants of Queens county, in all parts of it, and with the general feeling towards the Long Island Railroad Company; he had never discovered, nor did he believe that there was any general prejudice against the company among the inhabitants of Queens county; on the contrary, he believed the company was generally popular there, and he had no

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Houghton agt. Gardner.

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doubt but that as fair and impartial a trial of this cause might be had in that county as in any county in the state. Plaintiffs then produced and read the affidavits of twenty-one different individuals of Queens county, stating the same facts as the last. Plaintiffs stated that they were anxious and willing that a fair and impartial trial should be had in this suit, and for that purpose would consent that the venue should be changed to the county of Queens.

A. TABER, *defendants' counsel.*

JOHN DIKEMAN, *defendants' attorney.*

A. G. CHATFIELD, *plaintiffs' counsel.*

S. B. STRONG, *plaintiffs' attorney.*

BEARDSLEY, Justice. Was clearly of opinion, from the facts before him, that justice required this cause should be tried in some other county than either Suffolk or Queens; and if the plaintiffs chose Richmond in preference to Westchester, they might take Richmond. Rule was accordingly entered changing the venue from Suffolk to Richmond county.

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CARLOS P. HOUGHTON *et al.* agt. DAVID GARDNER.

Costs of opposing a motion for a new trial, after judgment entered, may be collected by precept, or the party may at his election make up a new record and include them in it.

Where a defendant moves for a new trial after judgment entered, and the motion is denied on the plaintiff's deducting a certain sum from the verdict (which was erroneously inserted), defendant is liable for costs of opposing motion.

*April Term, 1846.*

MOTION that defendant pay balance of taxed bill of costs, or that precept issue.

[145\*] \*This cause was tried at the New-York circuit, in

February, 1844, and a verdict rendered for plaintiffs, for \$188.79, judgment was entered February 22d, 1844, for the amount of the verdict and costs up to that time; execu-

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Houghton agt. Gardner.

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tion was afterwards issued, and the amount collected on the execution. On the 7th of June, 1844, a motion was made by defendant for leave to make a case or bill of exceptions (the time for that purpose having expired), and for a stay of proceedings until the case or bill should be decided. Upon that motion an order was made by this court, granting defendant leave to make a case or bill of exceptions in twenty days, on payment of costs of opposing the motion, but not granting a stay of proceedings; defendant made a case and it was brought to argument at the last January term, and an order made that a new trial be denied, on the plaintiffs' deducting \$11.98 from the verdict; the court found that an error had been made in computation of interest, by which the verdict was for \$11.98 too much; the plaintiffs' counsel then offered to deduct that amount from the verdict. The plaintiffs' costs of opposing the motion for a new trial were taxed on the 7th February last, at \$65.08, and a copy taxed bill, copy order denying a new trial and a stipulation to deduct \$11.98 from the bill as taxed, were served on defendant, and the balance, \$53.10, demanded of defendant, which he refused to pay.

Defendant's counsel insisted that the defendant was not bound to pay costs at all, that he had virtually succeeded on the motion for a new trial; and, at any rate, if the plaintiffs were entitled to the costs, they could not collect them on a precept, they should be included in the judgment record.

M. T. REYNOLDS, *plaintiffs' counsel.*

F. SAYRE, *plaintiffs' attorney.*

G. R. J. BOWDOIN, *defendant's counsel.*

R. H. SHANNON, *defendant's attorney.*

BEARDSLEY, Justice. Held that the plaintiffs were entitled to the balance of the costs, and that they might elect which way they would collect them, either to make up a new record and include the costs in it, or take a precept. Plaintiffs' counsel elected to take a precept, and the rule was entered that the defendants pay \$53.10, with \$10 costs of this motion, in twenty days after service of the order, or that a precept issue therefor.

## [\*146] THE CORTLAND COUNTY MUTUAL INSURANCE COMPANY agt. MILTON S. LATHROP.

Same agt. REUBEN SAXTON.

Where pleas are served, not verified by affidavit, when they are required to be under the rules, an attorney upon whom such pleas are served, if he regards them as a nullity, is bound to return them immediately, or give notice that they are regarded as a nullity.

The costs of one motion only will be allowed, where two or more separate motions contain substantially the same facts, and the same plaintiffs and attorneys; they may be made as one motion. (2 *Howard*, 33.)

*April Term, 1846.*

MOTION by defendant in each cause to set aside default and subsequent proceedings, for irregularity.

Declaration was on a promissory note in writing, made by defendant to the plaintiffs, on a policy of insurance, payable in such portions and at such times as the directors of the plaintiffs might agreeably to their act of incorporation require: the declaration counted upon this note, and described it in the body of the declaration, but did not set out a copy of the note at the close of the declaration, with a notice that it was the only cause of action, &c.: there was but one count in the declaration. A copy of the declaration was served on defendant's attorney, February 11th, 1846. On the 25th February, 1846, defendant's attorney served on plaintiffs' attorney a copy plea of the general issue, copy special plea in bar, and notice of special matter in bar. On the 7th March, 1846, plaintiffs' attorney entered default for not pleading, and served on defendant's attorney, on the 9th March, notice of assessment of damages. There was no affidavit verifying defendant's pleas, nor other affidavit of merits by defendant. Plaintiffs' attorney did not return the pleas, or give defendant's attorney any notice that they would be disregarded, but treated them as a nullity.

The facts in each cause were the same. Defendant moved on two sets of papers entitled in each cause separately.

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Grosfent agt. Tallman.

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W. H. SHANKLAND, *defendant's counsel and attorney.*M. T. REYNOLDS, *plaintiffs' counsel.*H. S. CONGER, *plaintiffs' attorney.*

BEARDSLEY, Justice. Set aside the inquest in each cause, with \$10 costs of one motion, as both motions might have been included in one set of papers, the plaintiffs and attorneys being the same, and the facts the same. (2 *Howard*, 33.) The ground of the decision was, that the plaintiffs' attorney should either have returned the pleas or have given notice, immediately after their service, that he should treat them as a nullity.

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\*WILLIAM GROSFENT agt. DARIUS TALLMAN. [\*147]

Where a plaintiff assigned his interest in a suit, soon after its commencement, and before any costs were made on the part of the defendant, to third persons who agreed to indemnify and save harmless the plaintiff from all costs, &c., in the further prosecution of the suit; and the defendant in the event succeeded, and got judgment for costs against plaintiff, and a *ca. sa.* was issued and plaintiff imprisoned; and on a motion by plaintiff to compel the assignees to pay the amount of the judgment for costs, &c. *Held*, that the plaintiff to the record was liable for the costs, and the motion to compel the assignees to pay it should be denied with costs.

*April Term, 1846.*

MOTION by plaintiff, to require Samuel Tiffany and George W. Tiffany to pay the judgment in this cause, and costs of a *ca. sa.*, or that an attachment issue.

Plaintiff commenced this suit by *capias*, September 1st, 1845. On the 17th of September, 1845 (and before notice of retainer on the part of defendant was served), the plaintiff for a valuable consideration assigned to Samuel Tiffany his interest in the suit, and Samuel Tiffany and George W. Tiffany executed and delivered to the plaintiff a writing, as follows: (title of the cause), "In consideration of William Grosfent, plaintiff in this cause, having assigned to me his interest therein, I do hereby agree to indemnify and save harmless said Grosfent from all damages and costs he may sustain, in conse

Carew agt. President, &c., of Mechanics' and Farmers' Bank.

quence of the prosecution of this suit from this time, dated September 17th, 1845. (Signed), Samuel Tiffany, George W. Tiffany." Plaintiff stated that, after that date, the suit was prosecuted for the benefit of one or both of the Tiffanys, and not for his benefit. Such proceedings were afterwards had in the suit, that on the 7th of January, 1846, judgment was docketed against the plaintiff for \$61.32 costs. A *ca. sa.* was issued thereon against the plaintiff, and on 13th of January last he was committed to the jail of Oswego county, and was still a prisoner on the limits about four miles from his residence, he was sixty years of age, and was wholly and utterly unable to pay the judgment. Plaintiff stated the particular circumstances under which the suit was commenced, and the manner the Tiffanys became connected with it.

At the time the assignment was made to the Tiffanys, on the 17th of September, 1845, L. A. Card, Esq., was substituted as attorney for the plaintiff, in the place of X. D. Freeman, Esq., (who commenced the suit), by a written request signed by the plaintiff; a rule for substitution was afterwards entered, and notice served on defendant's attorneys.

M. T. REYNOLDS, *plaintiff's counsel.*

J. C. WRIGHT, *plaintiff's attorney.*

L. A. CARD, *counsel and attorney, opposed.*

BEARDSLEY, Justice. Denied the motion with costs, on the ground that the plaintiff to the record could not get rid of the liability of defendant's costs, because he had previously assigned his interest in the suit, to third persons; he must be held responsible to the final result.

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[\*148] \*JOSHUA L. CAREW *et al.* agt. THE PRESIDENT, &c.,  
OF THE MECHANICS' AND FARMERS' BANK in the  
city of Albany.

Where defendants, on a motion to change the venue, state that if the plaintiffs have more witnesses (than defendants) in the county where the venue is laid, they



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can only be necessary for plaintiffs to prove certain facts, which facts the defendants stipulate to admit on the trial, in case the venue is changed; and the plaintiffs swear to more witnesses than defendants, and that neither of them is necessary for plaintiffs to prove any of the facts offered to be admitted by defendants, but *other facts*; he must state *what those other facts are*.

*April Term, 1846.*

MOTION by defendants to change the venue.

This was an action of assumpsit, venue laid in the city and county of New-York. Cause not at issue. Defendants swore to five witnesses residing in the city of Albany, and two residing in Corning, Steuben county, as being material, &c., for them on the trial of the cause. Plaintiffs served a bill of particulars, which contained two general items, and defendants alleged that the plaintiffs rested their whole claim on facts, contained in the third (special) item, and which was the only real cause of action, if any, and which third item was substantially, that the plaintiffs deposited in the bank of the defendant, for collection, a certain alleged draft or bill of exchange, dated May 10th, 1844, drawn by one George W. Hanmer, upon one D. Hanmer, of *Albany* (as was stated), payable to the order of plaintiffs, at the banking house of defendants, in Albany; that the same was accepted, and that the acceptor, D. Hanmer, paid defendants for the use of plaintiffs' \$400, to be applied to the payment of the draft, but which the defendants refused or neglected to apply as aforesaid, or to account therefor to the plaintiffs.

Defendants stated that the cause of action, if any, arose, as they believed, in the city of Albany, and the defendants' witnesses were necessary and material to show the amount of funds (if any) in the possession of defendants, belonging to D. Hanmer, and paid to defendants, in deposit at the time such payment, for the purpose aforesaid, is alleged or may be claimed to have been made, also to show the times and the manner and the circumstances under which the moneys deposited with, or paid to the plaintiffs (if any), were paid to, or for the use of, or withdrawn by D. Hanmer, or upon his order or under his directions, further to show the state of the

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accounts between the defendants and D. Hanmer, at the time aforesaid, further that two of said witnesses were necessary to show the custom of banks in Albany, in case of like deposit. Defendants also, in their affidavit, stated that if the plaintiffs insisted that witnesses important to them (except D. Hanmer) resided in the city of New York, or out of the county of Albany, that it could only be to prove the date, amount [\*149] and \*terms of the draft or bill of exchange, or the parties thereto, or the execution, indorsement, or the return of the draft unpaid, or the non-payment to the plaintiffs of the amount alleged to have been deposited for their use; all which, in case of the change of venue to Albany county, the defendants were willing, and thereby stipulated to admit on the trial of the cause, in order to obviate the necessity of proof of those facts by the plaintiffs.

On the part of the plaintiffs, it appeared that they were a late firm, doing business in the city of New-York; issue was joined in this cause on the 18th of February last, and on the same day plaintiffs' attorney received from defendants' attorney order staying proceedings, &c., for this motion, and, had not the order been served, the cause might have been noticed and brought to trial at the circuit in New-York, held on the 3d Monday of March last. Plaintiffs swore to eleven witnesses residing in the city of New-York, that were material and necessary for them, &c. And that they were not, nor was either of them material or necessary to prove any of the matters of fact offered to be admitted by the defendants in case the venue was changed, but that each and every of them were material and necessary for the plaintiffs to prove other facts than those stated by defendants, and in case defendants did not stipulate to admit the facts (on the trial) mentioned in their papers, other witnesses residing in the city of New-York would be material and necessary for plaintiffs to prove those facts.

M. T. REYNOLDS, *defendants' counsel.*

S. D. VAN SCHAAK, *defendants' attorney.*

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Purdy agt. Morgan.

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N. HILL, JR., *plaintiffs' counsel*.M. G. HARRINGTON, *plaintiffs' attorney*.

BEARDSLEY, JUSTICE. Granted the motion, on the ground that the plaintiffs did not state what those *other* facts were, which required their number of witnesses to prove.

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JESSE PURDY agt. JOSEPH W. MORGAN and JOHN MORGAN.

TAXATION OF COSTS.—Costs on the part of defendants, for attending the circuit with their witnesses prepared to try the cause, can not be allowed where the defendant left court under an apprehension that a criminal cause would occupy the remainder of the circuit, but was disposed of, and the defendants' cause was called and an inquest taken, no one appearing on the part of the defendant to try. The inquest afterwards set aside on terms, and the defendants finally succeeded in the suit.

*April Term, 1846.*

MOTION by plaintiff for a retaxation of defendants' costs.

An inquest \*was taken in this cause at November [\*150] circuit, 1844, in its regular order on the calendar, no one appearing on the part of the defendants. On the 8th February, 1845, defendants moved to set aside the inquest, which was granted on payment of costs of circuit and subsequent proceedings, and seven dollars costs of opposing the motion, plaintiff at liberty to perfect judgment to stand as security. The defendants succeeded in the final event, and in their bill of costs charged "Attorney and counsel fee prepared to try, \$6; Dr. and eng. subpoena, \$1; 6 tickets, \$1.50; serving same, 0.75; ticket money, \$3; 6 witnesses traveling (returning) 168 miles, 4 cents a mile, \$6.72; paid judge for order staying proceedings, \$1."

The first five of the items mentioned were the costs of defendants for November circuit, 1844. Plaintiff objected to those items, on the ground that the cause was called in its regular order on the calendar at November circuit, 1844, and n.

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Faulkner agt. The Mayor of Brooklyn.

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person appeared on behalf of the defendants, and an inquest was taken, that afterwards the inquest was set aside by defendant, on payment of the costs of the circuit, &c. And as to the sixth item, the charge of one dollar paid the judge for an order staying proceedings, it was objected that it was an *ex parte* order, obtained by the defendants for their own benefit, in order to prevent the plaintiff perfecting judgment upon the inquest taken by him. Plaintiff stated that these objections, taken before the taxing officer, were not denied or disputed on the part of the counsel attending the taxation for defendant, and a copy of the order setting aside the inquest was produced before the taxing officer.

On the part of the defendants, it appeared that they attended the November circuit, 1844, with their witnesses, with an intention to try the cause, when a criminal cause was taken up for trial, which it was supposed would occupy the remainder of the circuit, and the defendants left, expecting this cause could not be tried at that circuit; but the criminal cause was disposed of sooner than was anticipated, and this cause was called and an inquest taken. The taxing officer decided that the items objected to were proper charges, and allowed them after deducting \$5.19 therefrom.

G. R. J. BOWDOIN, *plaintiff's counsel.*

GEORGE P. NELSON, *plaintiff's attorney.*

N. HILL, JR., *defendants' counsel.*

McCOUN & CLARK, *defendants' attorneys.*

BEARDSLEY, Justice. Ordered a retaxation, on the ground that the items objected to were not taxable.

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[\*151] \*JAMES FAULKNER agt. THE MAYOR AND COMMON COUNCIL OF BROOKLYN.

Where notice of trial is served for a subsequent circuit, *before the close of the circuit at which the cause has been noticed and is on the calendar.* a reservation should

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Faulkner agt. The Mayor of Brooklyn.

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be inserted in the last notice, to the effect that *in case the cause is not tried at the present circuit.*

*April Term, 1846*

MOTION by defendants to set aside inquest, for irregularity.

An inquest was taken in this cause on the 8d March last, at the New-York circuit. Several months previous to the inquest, defendants' attorney served on plaintiff's attorney an affidavit of merits. On the 2d of March last, plaintiff's attorney served on defendants' attorney the usual notice of trial and inquest for the circuit to be thereafter held on the third Monday of March; defendants' attorney, supposing that the effect of the last notice of trial was to countermand the previous one, and that it was to apprise the defendant that the cause would not be tried until the circuit specified in the last notice, did not pay any further attention to it, but if he had not understood the effect of the notice of trial to be a waiver of the right to try under the previous notice, he would have been ready to try the cause, when it was called on the calendar. Defendants' attorney stated that he was informed the circuit judge announced to the bar, towards the close of the circuit at which the inquest was taken, that no causes but short causes (such as might be tried in an hour or thereabouts) would be tried, that by reason of such announcement, a large number of causes when called were marked down, and that by reason thereof alone, this cause was reached at that circuit; that by a standing order of the circuit, a limited number of causes were put on the calendar for each day; that if this rule had been adhered to until the close of the circuit, this cause could not, in all probability, have been reached; he was not aware that the order had been suspended, so as to make a railroad calendar of short causes; this was not a short cause within the meaning of the rule made by circuit judge for the trial of short causes, and believed the circuit judge would not have tried it, if he (defendant's attorney) had been in court when it was called and an inquest taken.

J. M. VAN COTT, *defendants' counsel and attorney.*

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Tears agt. Van Buren.—Same agt. Van Buren, Jr.

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M. T. REYNOLDS, *plaintiff's counsel.*

E. L. FANCHER, *plaintiff's attorney.*

BEARDSLEY, Justice. Set aside the inquest and referred the cause, *costs to abide the event*, as it was a new point, and held that it would be well, and indeed ought to be done, in cases where there is a notice of trial served for a subsequent circuit before the close of the circuit at which the cause has already been noticed and put upon the calendar, to [\*152] insert in the \*notice a reservation, to the effect that *in case the cause is not tried at the present circuit*; such instances would frequently occur, probably, in the city of New-York, where the circuits come near together.

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CATHERINE TEARS agt. BARENT VAN BUREN.

Same agt. BARENT VAN BUREN, JR.

Where a suit was commenced against A. B., and the declaration served on him, and he appeared and pleaded in the suit, where plaintiff's attorney ascertained that the declaration had been served on the wrong person; the suit was intended to have been commenced and declaration served on A. B., Jr.; and plaintiff's attorney informed defendant's attorney that it was a mistake, and requested the pleadings changed to the suit against A. B., Jr., and the defendant's attorney afterwards pleaded and defended for A. B., Jr. Held, that the information or notice to defendant's attorney was not a discontinuance of the first suit, and defendant had a right to go on and enter judgment for costs of *non pros.*; and such judgment was allowed to be set off against the judgment which was recovered by plaintiff against A. B., Jr., he having become the assignee of the first judgment before the judgment in the second suit was perfected.

*April Term, 1846.*

MOTION by defendant in the second cause to have the judgment in the first cause set off against the judgment in the second cause.

On the 20th November, 1844, judgment of *non pros.* was perfected in the first above entitled cause in favor of the defendant for \$25.70 costs. On the 19th September, 1845, a verdict was rendered in favor of the plaintiff in the second

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Tears agt. Van Buren.—Same agt. Van Buren, Jr.

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entitled cause for \$87.15, and judgment perfected on the 10th of January, 1846, for \$142.49 damages and costs. On the 22d September, 1845, defendant's attorney served a notice on the plaintiff and her attorney in the second cause, that Barent Van Buren, Jr., was then the owner as assignee of the judgment in the first cause, and offered to set off that judgment (without motion) against the verdict or judgment to be entered thereon in the second cause, which offer was not complied with by plaintiff. Defendant's attorney stated that he did not know that the judgment in the second cause had been entered until the 23d or 24th of January last.

It appeared, in opposition to the motion, that the suit in the first cause was commenced on a draft upon E. & J. Galatian, signed "Barent Van Buren," payable to the order of the plaintiff. At the time the draft was made, the drawer resided in Orange county, and when the suit was commenced he had removed to Columbia county, and the sheriff of Columbia county served the declaration on Barent Van Buren, the father of \*the drawer. After plaintiff's attorney [\*158] had received a plea and notice from defendant's attorney, he discovered that the declaration had been served on the wrong person, and then wrote to defendant's attorney informing him of the mistake, and that he did not intend to commence a suit against Barent Van Buren, Senior, and offered to transfer the pleadings to the suit intended to be commenced against the son. Plaintiff's attorney afterwards received pleas from defendant's attorney in the suit which plaintiff's attorney had commenced against Barent Van Buren, defending as Barent Van Buren, Jr.

Plaintiff's counsel insisted that defendant went on in the first suit, after he had notice that the declaration was served on the wrong person, in bad faith.

C. L. MONELL, *defendant's counsel.*

H. HOGEBOM, *defendant's attorney.*

A. TABER, *plaintiff's counsel.*

C. BORLAND, *plaintiff's attorney.*

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Hill agt. Watson.

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BEARDSLEY, Justice. Held that the information or notice given by plaintiff's attorney to defendant's attorney, of the mistake, was not a discontinuance of the first suit, and defendant had a right to go on and enter his judgment for costs.

Motion granted, without costs.

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JARVIS H. HILL agt. GEORGE H. WATSON.

A judgment, entered *within ten days* from the time of the delivery of the report by the referees, is an irregularity, and will be set aside with costs. (*See 45th [new] rule.*)

*April Term, 1846.*

MOTION by defendant to set aside judgment and subsequent proceedings, for irregularity.

This cause was noticed for trial at the last February circuit in Monroe county; an affidavit of merits was filed by defendant's attorney on the first day of the circuit, and a copy served on plaintiff's attorney; during the circuit the cause was referred to three referees on motion of plaintiff, without any written notice to defendant's attorney. On the 7th of March last, the cause was brought to a hearing before the referees, and on the 14th of March, after the referees had delivered their report, plaintiff's attorney filed a record and perfected judgment in the cause, and a *ca. sa.* was issued and the defendant arrested and imprisoned; no copy of the report was served on defendant's attorney.

A. WORDEN, *defendant's counsel.*

GEORGE E. KING, *defendant's attorney.*

H. HARRIS, *plaintiff's counsel.*

JAMES ABRAMS, *plaintiff's attorney.*

BEARDSLEY, Justice. Granted the motion with costs, on the ground that the judgment was entered *within ten days* after the report of the referees was delivered in violation of the new rules. *See 45th rule S. C.*



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Petit agt. Hewlett.

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\*JEDUTHAN G. ROSS agt. HIRAM S. BEECHER *et al.* [\*157]

An affidavit, for the purpose of a motion to *refer* a cause, should be made by the *party*, or some excuse given why it is not. An affidavit made by the *attorney* of the party moving, and no excuse given why it was not made by the party; held, bad. (2 *Howard*, 7.)

*June Term, 1846.*

MOTION by plaintiff for reference.

The affidavit upon which this motion was founded was made by the plaintiff's attorney, and no excuse mentioned in it why it was not made by the plaintiff himself.

E. J. SHERMAN, *plaintiff's counsel and attorney.*

JAS. FORSYTH, *defendants' counsel.*

HUNT & FORSYTH, *defendants' attorneys.*

JEWETT, Justice. Denied the motion with costs, on the ground that the affidavit should have been made by the plaintiff, or some excuse given why it was not.

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CHARLES L. PETIT and wife agt. GEO. M. HEWLETT *et al.*,  
ex'rs, &c.

It is *irregular* for defendant to move for his costs in attending a circuit prepared to try, where plaintiff does not bring the cause to trial when called, he should move for judgment as in case of *nonsuit*.

*June Term, 1846.*

MOTION by defendants to be allowed their costs for attending circuit.

The affidavits showed that the cause was noticed by plaintiffs' attorney for the Queens circuit in May last. Defendants attended with their witnesses, prepared to try. On the last day of the circuit the cause was called, and passed, plaintiffs not being present to try it.

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 Hinman agt. Mambrat.
 

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[\*158] \*PIERPONT POTTER, *defendants' counsel and attorney.*  
 J. H. COLLIER, *plaintiffs' counsel.*  
 NN A. P. RALPH, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion with costs, on the ground that the motion was *irregular*. Defendants should have moved for *judgment as in case of nonsuit*.

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ISAAC P. VAN ALLEN agt. JOHN H. REYNOLDS.

A declaration entitled of a term, *subsequent* to the term at which the *capias* is made returnable, will be set aside as irregular. (12 *Wend.* 293.)

*June Term, 1846.*

MOTION by defendant to set aside declaration, for irregularity.

This suit was commenced by *capias ad respondendum*, tested on the 3d Monday of October, 1845, and returnable on the first Monday of January, 1846. On the 20th May, 1846, a declaration was filed, and copy served on defendant's attorney, both of which were entitled, "of the term of May, 1846." Defendant's counsel cited 3 *T. R.* 626; 12 *Wend.* 293; *Arch. Pr.* 337; 1 *Burrill Pr. new ed.*, 120.

J. H. REYNOLDS, *defendant's counsel.*

WM. H. TOBEY, *defendant's attorney.*

C. P. SCHERMERHORN, *plaintiff's counsel and attorney.*

JEWETT, Justice. Granted the motion with costs, on the authority of the 12 *Wendell*, 293, with leave to plaintiff to amend.

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HENRY V. V. HINMAN agt. WILLIAM H. MAMBRAT.

A declaration entitled *generally* of a term, at which the *capias* is made returnable at a *particular day* in term, to wit, the second Saturday, will be set aside as irregular. (2 *Wend.* 525; 18 *Wend.* 534.)

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McCormick agt. Fullerton.

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*June Term, 1846.*

MOTION by defendant to set aside judgment, for irregularity.

This suit was commenced by *capias ad respondendum*, tested the first Monday of January, 1846, and made returnable the 17th January, 1846, being the second Saturday of the same term. On the 20th May, 1846, a declaration was filed and a copy served on defendant's attorney, both of which were entitled *generally*, "of the term of January, 1846." Defendant's counsel cited 3 *T. R.* 42; *Burrill's Pr.* 120; 1 *Tidd's Pr.* 430; 2 *Wend.* 525; 18 *Wend.* 534.

J. H. REYNOLDS, *defendant's counsel.*

WM. H. TOBEY, *defendant's attorney:*

C. P. SCHERMERHORN, *plaintiff's counsel and attorney.*

JEWETT, Justice. Granted the motion with costs, with leave to plaintiff to amend, on the authorities cited by defendant's counsel.

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\*JACOB McCORMICK agt. JAMES J. FULLERTON. [\*159]

Where defendant's attorneys had received a stipulation from plaintiff's attorney, extending the time to plead twenty days, and defendant's attorneys craved oyer of the bond which was served by plaintiff's attorney nine days after stipulation; held, that defendant was bound to plead within the time prescribed by the stipulation; the time did not run twenty days *from the time of the service of oyer.*

*June Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings, for irregularity.

On the 21st day of March, 1846, declaration was served. On the 10th of April, plaintiff's attorney gave defendant's attorneys a stipulation extending the time to plead twenty days from the 10th of April. On the 9th of April defendant's attorneys craved oyer of the bond upon which the suit was brought, and on the 18th April oyer of the bond was served

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Jones agt. Aldrich.

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on defendant's attorneys. On the 2d May plaintiff's attorney entered defendant's default for not pleading. On the 8th of May defendant's attorneys filed plea and served copy on plaintiff's attorney, who refused to receive it, for the reason that he had entered defendant's default.

Defendant's counsel insisted that the default was irregular; that defendant had twenty days to plead from the time of service of oyer.

GEO. WOODMAN, *defendant's counsel.*

RODGERS & WOODMAN, *defendant's attorneys.*

PETER Y. CUTLER, *plaintiff's counsel and attorney.*

JEWETT, Justice. Held, that defendant was bound by the stipulation, and should have pleaded in twenty days from that time; the service of oyer afterwards did not extend the time to plead; default was regular. Motion denied with costs without prejudice.

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SILAS JONES agt. GILBERT T. ALDRICH.

Where defendant moved on papers made out for a motion for judgment of *non pros.*, but drew his notice of motion for judgment as in case of *nonsuit*, and it was objected to the motion for judgment of *non pros.*, on the ground that defendant did not ask for it in his notice; held, that plaintiff was not misled by it; it was evident from the papers themselves what the notice should have been, and judgment for *non pros.* was made and granted on the papers.

*June Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

Defendant's notice of motion stated that he moved for judgment as in case of nonsuit in this cause, by reason of the plaintiffs having failed to *file security for costs*, according to the statute, &c. Defendant's papers showed that an absolute order to file security for costs had been granted, which plaintiff had not complied with.

[\*160] \*P. CAGGER, *defendant's counsel.*

S. V. R. MALLORY, *defendant's attorney.*

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Silliman agt. Clark.

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M. T. REYNOLDS, *plaintiff's counsel.*

H. K. JEROME, *plaintiff's attorney.*

It was objected that the notice of motion should have been for judgment of *non pros.*; that defendant could not move for it under his notice for judgment, as in case of nonsuit.

JEWETT, Justice. Held, that the plaintiff was not misled by the notice, it was evident from the papers themselves what the notice should have been; it was not such an irregularity but what the defendant might move for judgment of *non pros.* Motion for judgment of *non pros.* granted.

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ROBERT D. SILLIMAN *et al.* agt. JAMES A. CLARK *et al.*

A notice of trial (printed form), served for a circuit to be held on the 4th —day of April, will be held good for the 4th *Monday* of April, where it is retained by the attorney upon whom it is served. If such a notice is considered irregular, it is the duty of the attorney to return it immediately.

*June Term, 1846.*

MOTION by defendants for judgment as in case of nonsuit, or to set aside an order of reference.

Issue was joined in this cause in September last. Plaintiffs' attorney served notice of trial on defendants' attorney by mail on the 11th of March last, for a circuit in Rensselaer county, to be held on the 4th *Monday* of April thereafter; the venue was laid in Rensselaer county. Plaintiffs' notice of trial was a printed blank, filled up by inserting 4th —day of April, instead of making it 4th *Monday* of April. Defendant's counsel did not appear at the circuit in April; after the cause was called in its regular order on the calendar, the circuit judge, with the consent of plaintiffs' counsel, referred it to three referees. On the 18th of May a copy order of reference, and notice that the cause would be brought to a hearing on the 4th of June, was received by defendants' attorney. Defendants' papers stated that younger issues than this cause were tried

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Bleecker agt. Storms.

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at the April circuit. Plaintiffs' papers stated that no younger issue was tried before this cause was referred by the circuit judge.

H. Z. HAYNER, *defendants' counsel*.

ELI COOK, *defendants' attorney*.

G. STOW, *plaintiffs' counsel*.

J. A. MILLARD, *plaintiffs' attorney*.

Defendants' counsel insisted that the defendants' attorney had not been served with notice of trial for the April circuit, and that he had never been served with any notice of application for a reference in the cause; it was referred without his knowledge or consent. .

JEWETT, Justice. Held, that the cause was properly referred, and the notice of trial served on defendants' [\*161] attorney, being retained by him, \*was sufficient to inform him that the cause would be brought to trial at the April circuit, and at all events if defendants' attorney considered it irregular, it was his duty to have returned it immediately. Motion denied, with costs.

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GARRET N. BLEECKER *et al.* agt. ABRAHAM J. STORMS.

In an affidavit for motion to change the venue, defendant must state "that he has fully and *fairly* stated his case to his counsel" *in the proper form*; the regular form for such an affidavit should be followed.

*June Term, 1846.*

MOTION by defendant to remove this cause from the New-York common pleas into this court, and to change the venue.

Defendant's affidavit upon which the motion was founded was objected to as insufficient; that part of it which was alleged to be objectionable read as follows: "And this deponent further says that he has a good and substantial defence on the merits in the said cause, as he is advised by Henry

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Bleecker agt. Storms.

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Brewster, who resides in the city of New-York, and who is counsel for deponent in said cause, and as he verily believes. (And he further says that one ground of defence to the said action is, that the iron for which this suit is brought, or a large part of the same, was of a very different and inferior quality to that contracted for and ordered of the said plaintiffs.) And this deponent further says that he has stated the case in the cause so commenced as aforesaid to his said counsel; and he further says, George S. Myers and others (naming them) all reside at Nyack, in said county of Rockland, and that the above named persons are each and every of them material witnesses for this deponent, to his defence in said cause, as he is advised by his said counsel and verily believes; and he further says that he has fully stated his case to his said counsel, and disclosed to him the facts which he expects to prove by each and every of his said witnesses, and that without the benefit of the testimony of each and every of the said witnesses he can not safely proceed to the trial of this cause, as he is also advised by his counsel, and verily believes to be true; and this deponent therefore says he is advised and believes the trial in this cause should be held in Rockland county, and not in the city of New-York.

S. O. SHEPARD, *defendant's counsel.*

H. BREWSTER, *defendant's attorney.*

G. R. J. BOWDOIN, *plaintiffs' counsel.*

C. H. SMITH, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion, with costs, on the ground that the affidavit was informal and defective; defendant did not state that he *\*had fully and fairly* [\*162] *stated his case to his counsel* in the proper form, he had not stated that he had *fairly* stated it anywhere; he should require the regular form to be followed.

## ISAIAS W. WALLER agt. FRANCIS H. SAMMONS.

Motion for judgment as in case of nonsuit will be denied, with costs, where it would have taken at least one day to try the cause, and it was called out of its regular order on the calendar, as a short cause, the circuit judge having previously publicly announced to the bar not to try any causes during the remainder of the circuit, which would require more than one hour.

*June Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

Defendant's papers stated that issue was joined in this cause October 24th, 1845, and notice of trial given for the New-York circuit held on the 16th of March last, plaintiff did not try the cause, and issues of a later date were in the regular order of the calendar tried at the circuit. Plaintiff's attorney stated that it was true that issue was joined, and the cause was noticed for trial as stated by defendant, and that younger issues were tried at the circuit, but denied that they were called in their regular order on the calendar, but were called under the following circumstances, to wit: that Judge EDMONDS, who held the circuit, after having during the first three weeks of the term proceeded with the calendar of causes from day to day in the usual manner, until he had disposed of all the causes thereon up to No. 42, the issue whereof was joined on the 17th of August, 1844, announced to the bar that during the remainder of the term, which would be only the following week, he should not try any cause in which there was any defence, or which would take more than *one hour* to try; his object being to dispose of all the causes in which there was *in fact* no defence, and that all causes which would take more than one hour to try would be passed without prejudice, all of which, as the attorney for plaintiff believed, was well known and understood by defendant's attorney. And further, there were about three hundred and fifty causes on the calendar, the issues of about two hundred and fifty of which were older than this cause, and had the calendar been called in the usual or regular manner, no cause, the issue whereof was as late as this one by several months, could by any pos-



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Dunham agt. Clark.

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sibility have been reached. This was an action of trespass on the case, for injuries done to the plaintiff's child or servant, by defendant, by running over him with a horse and wagon, breaking his arm, ribs, &c. And that the trial would have occupied the court at least \*one whole [\*163] day, if not two, there were eight or ten witnesses to be examined on the part of the plaintiff, and a number on the part of the defendant.

After service of the papers for this motion, plaintiff's attorney explained to defendant's attorney the reason that he did not try the cause, and offered to stipulate to try at the next circuit; which defendant's attorney declined to do, unless the costs of the motion were paid.

J. H. RING, *defendant's counsel.*

R. F. WINSLOW, *defendant's attorney.*

H. HUNT, *plaintiff's counsel and attorney.*

JEWETT, Justice. Denied the motion with \$7 costs, on the ground that the cause was a long one, and did not come within the restrictions made by the circuit judge. Plaintiff's affidavit had fully answered the motion.

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HENRY R. DUNHAM *et al.* agt. EBENEZER CLARK.

Where a case was put on the *special* calendar of short causes at the New-York circuit (commonly known as the railroad calendar), by plaintiff's attorney, without notice to defendant's attorney, or to his knowledge; and an inquest taken by plaintiffs on the morning of the second day of the circuit, out of its order on the general calendar (the cause standing No. 171 on the general calendar); and an affidavit of merits having been filed and served by defendant's attorney, and he being in attendance at the circuit to try the cause; *held*, that it operated as a surprise upon defendant's attorney, and the inquest was set aside. Costs to abide event.

*June Term, 1846.*

MOTION by defendant to set aside inquest or verdict, for irregularity.

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Dunham agt. Clark.

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Defendant stated that issue was joined in this cause about the 10th of March last, and the cause subsequently noticed for trial at the New-York circuit (where the venue was laid) for the first Monday of May last. Defendant filed and served an affidavit of merits previous to the circuit. On the morning of the second day of the circuit, at about half-past nine A. M., defendant called on the clerk to see the calendar, and found that this cause stood at No. 171. Defendant having business in the supreme court, went in there at the opening of the court, and was not present at the opening of the circuit. At about 11 o'clock A. M., defendant met Mr. Sandford, one of the plaintiffs' attorneys, in the City Hall, and remarked to him that this cause would not be reached, and they had better consent to consider it off for the term. Sandford then informed him that they had taken a verdict for the plaintiffs in the cause that morning. Defendant insisted that it was irregular, and requested him (Sandford) to waive it and let it stand for trial, as defendant had a good and substantial [\*164] \*defence on the merits; which he declined to do.

Defendant then applied to the clerk of the circuit, and was informed by him that the calendar had not been called at all, neither on that day nor the day previous; but, produced to defendant a half-sheet of paper, on which were entered thirteen causes, selected out of the causes on the calendar, and among which was this cause; which half-sheet of paper, containing the thirteen causes, was headed as follows: "May Circuit, 1846. Special calendar of short causes." Defendant stated that he never knew or heard of such special calendar, or half-sheet of paper, until it was shown to him by the clerk; nor had he any intimation, by notice or otherwise, that this cause was to be placed any where except on the regular calendar of the circuit. Defendant stated that he had a good and substantial defence on the merits, and that the cause was not reached in its regular order on the calendar.

E. CLARK, *counsel and attorney in pro. per.*

P. CAGGER, *plaintiffs' counsel.*

SANDFORD & PORTER, *plaintiffs' attorneys.*

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Little agt. Bigelow.

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JEWETT, Justice. Granted the motion, the costs of the motion to abide the event of the suit, on the ground that defendant was taken by surprise. He had no notice of the cause being put upon the special calendar, commonly known in New-York as the railroad calendar.

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NELSON LITTLE agt. CHAUNCEY BIGELOW.

An affidavit for a reference should be made by the party, or a *sufficient* excuse shown why it is not. (2 *Howard*, 7, 157.)

*June Term, 1846.*

MOTION by plaintiff for a reference.

The affidavit for a motion was made by S. G. Haven, Esq. the law-partner of plaintiff's attorney, who stated that he was counsel for the plaintiff in the cause; that Millard Fillmore, Esq., the attorney for the plaintiff, was then absent from the county of Erie, where the venue in the cause was laid, and would not probably be back for some time to come; that the plaintiff resided in the town of Collins, at a remote part of the county of Erie, and could not, without inconvenience and loss of time, come to the city of Buffalo to have his affidavit drawn and sworn to. The affidavit then went on and stated the cause of action, and the particular claims on the part of the plaintiff, and also the particulars of the defendant's defence which would arise under his bill of particulars; and concluded by stating that the trial of the cause would involve the examination of a long account by both parties, &c.

\*M. FILLMORE, *plaintiff's attorney.*

[\*165]

C. HOWE, *defendant's attorney.*

It was objected by defendant's counsel that the affidavit for the motion did not come within the rule; it should have been made by the party, or a sufficient excuse shown.

JEWETT, Justice. The affidavit on which the motion is

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Baldwin agt. Woolever.

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founded is made by the law-partner of plaintiff's attorney; it should have been made by the plaintiff, no *sufficient* excuse is shown why it was not so made.' Motion denied with \$7 costs.

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CURTIS BOLTON *et al.* agt. JAMES McCULLOUGH.

The same point decided in this case as in the preceding motion of *Little agt. Bigelow*, only there was *no* excuse offered in the affidavit for this motion, why the plaintiff did not make it.

*June Term, 1846.*

MOTION by plaintiff for reference.

In this cause the plaintiffs' attorney made the affidavit for the motion, and gave *no* excuse why it was not made by the party.

J. H. COLLIER, *plaintiffs' counsel.*

CHARLES ANTHONY, *plaintiffs' attorney.*

J. NEWLAND, *defendant's counsel.*

J. C. SMITH, *defendant's attorney.*

JEWETT, Justice. Denied the motion with costs, on the same ground as in the preceding case of *Little agt. Bigelow*, only in this case *no* excuse was offered why the plaintiff did not make the affidavit for the motion.

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DANIEL A. BALDWIN agt. RUSSELL F. WOOLEVER.

A written agreement or stipulation, signed by the attorneys for the respective parties, "that the trial of this cause be put off until the next April circuit, to be held in and for Herkimer county, without prejudice to either party;" *held*, not to operate as a stipulation on the part of the plaintiff to bring the cause to trial at the April circuit. Plaintiff had a right to stipulate at the April circuit to bring the cause to trial at the next circuit, under the rule.

*June Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

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Baldwin agt. Woolever.

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Defendant's papers stated that issue was joined in this cause July 29, 1845. On the 21st of August, 1845, plaintiff's attorneys noticed the cause for trial at the circuit held for Herkimer county (where the venue was laid), on the third Monday of September, 1845; which circuit was regularly held, and all the business on the calendar disposed of; that on the 13th day of September, and a few days previous to the circuit, the attorneys of the \*respective parties [\*166] stipulated as follows: (title of the cause,) "It is hereby stipulated by and between the attorneys for the respective parties in this suit, that the trial of this cause be put off until the next April circuit, to be held in and for Herkimer county, without prejudice to either party." (Signed by the attorneys of the respective parties, and dated September 13, 1845.) The April circuit was held, and all the business on the calendar disposed of; this cause was not noticed for trial, nor tried at the April circuit pursuant to the stipulation. On the 10th day of April, the last day of the circuit, plaintiff's attorneys served on defendant's attorneys a stipulation to try at the next September circuit, and to pay all proper costs pursuant to the rules and practice of this court; which stipulation defendant's attorneys declined to receive, and returned it to plaintiff's attorneys.

D. BURWELL, *defendant's counsel.*

CAPRON & LAKE, *defendant's attorneys.*

P. CAGGER, *plaintiff's counsel.*

BENTON & BARRETT, *plaintiff's attorneys.*

Defendant's counsel insisted that the agreement made by the attorneys for the respective parties, on the 13th September, 1845, that the trial of the cause be put off UNTIL the next April circuit, operated as a stipulation to try at the April circuit.

JEWETT, Justice. Held that the agreement of the 13th September did not operate as a stipulation to try, it was nothing more in effect than an agreement to let the cause go over

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Carpenter agt. Tuffs.

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the circuit without prejudice to either party. The plaintiff's attorneys tendered a stipulation, and offered to pay costs under the rule, which was declined by defendant's attorneys. Motion denied with \$7 costs.

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JUSTIN CARPENTER agt. LUCIEN TUFFS.

Where defendant was misled, in not finding the cause on the circuit calendar some days after the circuit commenced, and before the plaintiff had taken an inquest in the cause, he served a notice of trial and inquest for the *next circuit* on defendant's attorney; defendant was allowed to come in and defend on terms, although he had not served an affidavit of merits for the circuit, merits being sworn to on the motion. The suggestion mentioned by Mr. Justice BEARDSLEY, in 2 *Howard*, 151, in giving notice of trial for a *subsequent circuit* before the close of the sitting circuit, approved and sustained.

*June Term, 1846.*

MOTION by defendant to set aside inquest and subsequent proceedings.

It appeared from defendant's papers that issue was joined in this cause on the 21st July, 1845; was noticed for trial for the New-York circuit, held on the fourth Monday of [\*167] December last. Plaintiff did not proceed \*to the trial at that circuit, but stipulated to pay defendant's costs of the circuit, and bring the cause to trial at the succeeding March circuit, to be held on the first Monday of March, 1846. Defendant's attorney made out his costs, had them taxed on notice, and demanded them of plaintiff, and he refused to pay. At the March circuit, plaintiff did not put the cause on the calendar, until some time in the third week of the circuit, when the circuit judge granted an order *ex parte* to have the cause placed upon the calendar on motion of plaintiff. Defendant's attorney repeatedly examined the general calendar during the first two weeks of the circuit, but did not find the cause thereon; he did not know that the cause was put upon the calendar (not having received any notice of it), until the afternoon of the 9th of April last, when he ascertained (by

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Carpenter agt. Tuffs.

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accident) that the plaintiff had taken an inquest in the cause; and on an examination of the calendar, defendant's attorney found the cause entered on the calendar, not among the causes on the general calendar, but as the thirty-second cause at the end of the general calendar, and after it had been made up. On the 3d of April last defendant's attorney was served with a *notice of trial* of the cause, for the first Monday of May thereafter. Judgment was entered on the 9th of April last. Defendant swore to merits. On the part of the plaintiff it appeared that no affidavit of merits was served on plaintiff until the 4th of May last, and after judgment had been entered in the cause. The cause was noticed for trial for the *third* Monday of March last, and on the 10th of March plaintiff filed with the clerk a note of issue, and paid the fees, but the clerk refused to put the cause on the calendar. On the morning of the first day of the circuit, in open court, plaintiff applied to the court to correct the calendar, and the circuit judge directed the clerk to put this cause on the calendar, which he did, and noted it to come in according to the date of its issue. On the 8th of April the cause was regularly put on the day calendar, and called in its regular order thereon, and an inquest taken the 9th of April. Plaintiff stated that the March circuit being quite short, and fearing that the cause might not be reached in its regular order, noticed it for trial and inquest for the succeeding May circuit.

JOHN TUFFS, *defendant's counsel and attorney.*

JUSTIN CARPENTER, *counsel and attorney in person.*

Defendant's counsel insisted that they had been misled, in not finding the cause on the calendar; the plaintiff's attorney should have given notice that he was going to place it upon the calendar. And further, that *\*the notice* [\*168] of trial served on defendant's attorney for the May circuit, when defendant's attorney was not aware of its being on the March calendar, was especially calculated to mislead. Defendant's counsel cited the case of *Faulkner agt. The Mayor, &c., of Brooklyn* (2 How. 151), decided by Mr. Justice BEARDS-

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Greenwood agt. Cleveland.

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LEY, to the point that the notice of trial served for the May circuit, before the close of the March circuit, should have contained the reservation therein mentioned, to wit: "in case the cause is not tried at the present circuit."

JEWETT, Justice. Granted the motion on payment of the costs of the circuit and subsequent proceedings, and \$7 costs of opposing motion, and expressed his opinion in favor of the suggestion of Mr. Justice BEARDSLEY in the case cited.

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HENRY B. GREENWOOD and ROSWELL SKEEL agt. DANIEL CLEVELAND.

Where a debtor has been arrested and convicted, under the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831," and afterwards puts in special bail under the amendatory act passed May 13th, 1845, and is subsequently *discharged* under and by virtue of the provisions of the act mentioned; such *discharge* does not exonerate or affect his *special bail*.

*June Term, 1846.*

MOTION by defendant to exonerate special bail.

It appeared from defendant's affidavit that a suit was commenced against him in December, 1845, at the city of New-York, by writ issued out of this court in favor of the plaintiffs, upon a demand arising upon contract, amounting to more than \$50, and upon which defendant alleged he could not, by the provisions of the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831," be arrested or imprisoned; the suit was prosecuted to judgment, and a *fi. fa.* issued, returnable the 28th of May, 1846. On the 6th of December, 1845, and after the commencement of the suit, he was arrested in the city of New-York upon a warrant issued by the Hon. AARON VANDERPOOL, one of the judges of the superior court of the city of New-York, upon the application and complaint of the plaintiffs in



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Greenwood agt. Cleveland.

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this suit, under the 3d and 4th sections of the said act, and the 4th subdivision of the fourth section. After an examination and hearing before the judge, upon the warrant, defendant was convicted, and by an order of the judge committed to jail; and after his committal he put in and perfected special bail in the action, under and by virtue of the provisions of the act entitled "An act further \*to amend [\*169] the 'Act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831,' passed May 13th, 1845," and was thereupon discharged from custody.

On the 8th day of April, 1846, defendant presented his petition, under the provisions of the 12th and subsequent sections of the said act to abolish imprisonment for debt, as an insolvent and petitioning debtor, to the Hon. PHILO GRIDLEY, circuit judge, for a discharge of his person from further arrest or imprisonment in the suit, and for the benefit of the provisions of the last mentioned act; and on the 11th of April, 1846, a discharge was granted him by the circuit judge (after a hearing, and opposition by the plaintiffs), which was recorded in the office of the clerk of Oneida county, on the 13th of April, 1846; an exemplified copy of the discharge being used on this motion. The special bail were Ransom Curtis, of the city of New-York, and Edward Eames, of the city of Utica.

Defendant's counsel insisted that the discharge of the defendant under the act mentioned exonerated the special bail.

J. M. HATCH, *defendant's counsel and attorney.*

R. W. PECKHAM, *plaintiffs' counsel.*

JOHN SHERWOOD, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion, with \$7 costs, on the ground that the defendant's *discharge* did not at all affect the liability of the special bail.

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Savage agt. Carpenter.

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CHARLES A. SAVAGE *et al.* agt. CYRUS CARPENTER.

Where defendant and another person swore positively to the service of a declaration on defendant, on the *ninth* of April, and gave circumstances as evidence of their knowledge of the time; and the plaintiffs' attorney swore that he made the service on the defendant on the *tenth* of April, and on the same day, and soon after it was made, he entered the service, and the time of making it, in his register; held, that the entry made in the attorney's register on the same day the service was made must control, and be considered conclusive as to the time of the service.

*June Term, 1846.*

MOTION by defendant to set aside appearance, default and all subsequent proceedings, for irregularity.

Defendant's papers showed that this suit was commenced by declaration, which was specially entitled of the ninth of April, 1846, and was filed April 10th, 1846. Judgment perfected against the defendant by default on the 5th May last. Defendant's affidavit stated that on Thursday, the *ninth* of April, 1846, at Brockport, in the county of Monroe, a copy of the declaration, with a notice to plead thereon endorsed, was served on defendant by Stephen Wheeler; no other service was made on him at any other time; defendant's [\*170] attention \*was called to the time of such service by counsel, consulted by him soon after it was made, and the time was fixed in defendant's memory; that Edward Sanford, then of Brockport, was present, and worked with defendant when the service was made, and defendant called his attention to the time soon after: also that defendant knew the time, from the place at which he was at work, and the work about which he was then engaged, and was perfectly clear and distinct in his recollection that it was the *ninth* day of April. Edward Sanford's affidavit stated that he was at work with the defendant at a job of painting, when the copy declaration was served on defendant, by Stephen Wheeler, and his attention was called to the time of service soon after, by the defendant, and he knew that the service was made on Thursday, the *ninth* of April last, and was sure of it from the circumstance,

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Cary agt. Livermore.

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among others, that on Friday, the 10th of April, Andrew Eaton, who was also at work with defendant, at the time of the service, left Brockport and started for Seneca Falls.

Plaintiffs' papers showed, from the affidavit of Stephen Wheeler, plaintiffs' attorney, that on the *tenth* day of April, 1846, he served upon defendant, personally, the copy declaration in this cause, and at the time of such service the defendant was at work alone; that neither Edward Sanford nor any other person was present, nor was there any person in sight or hearing of them, to the best of his knowledge and belief; *soon after, and on the same day of the service, he entered the service, and the time, in his register of causes, and from the date of the entry, and from other circumstances, he knew the service was made on the tenth day of April last.* The affidavit of service was filed, and defendant's default entered on the 2d May last.

J. H. COLLIER, *defendant's counsel.*

J. FULLER, *defendant's attorney.*

P. CAGGER, *plaintiffs' counsel.*

S. WHEELER, *plaintiffs' attorney.*

JEWETT, Justice. Denied the motion, without costs, and with leave to defendant to plead on payment of costs of default and subsequent proceedings, and held, that the entry in the attorney's register of the time of the service, it being done the same day, must control and be held conclusive that it was made on the 10th of April.

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JAMES E. L. CARY agt. ELIAS LIVERMORE.

An affidavit for motion to change venue omitted to state that defendant had fully and fairly *stated his case* to his counsel, and omitted to state that his witnesses were *necessary*, also omitted to state that he had *fully and fairly disclosed to his said counsel \*the facts which he expected to prove* [\*171] *by each and every of his said witnesses*, held, that the defects named were sufficient to deny the motion with costs, but without prejudice, to the end that the defendant's attorney might have a chance to try again.

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Cary agt. Livermore.

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*June Term, 1846.*

MOTION by defendant to change the venue.

It was objected by plaintiff's counsel, that the affidavit of defendant upon which the motion was founded was defective. The material part of the affidavit was then read as follows (after stating the cause of action, and where the venue was laid): "that this deponent has a good and substantial defence on the merits in this cause, as he is advised by his counsel, Abial Cook, of Norwich, in the county of Chenango, and verily believes to be true." (It then went on and stated where the cause of the action arose, and named the witnesses.) "And that each and every of the above named persons are material witnesses for this deponent to his defence of this cause, as he is likewise advised by counsel and verily believes, and without the testimony of each and every of the said named persons, he cannot safely proceed to the trial of this cause, as he is also advised by counsel and verily believes to be true." The affidavit then closed by stating when the declaration was served, and how far the witnesses resided from the court houses in the respective counties.

P. CAGGER, *defendant's counsel.*

GEO. M. SMITH, *defendant's attorney.*

J. H. COLLIER, *plaintiff's counsel.*

J. S. FROST, *plaintiff's attorney.*

Plaintiff's counsel insisted that the affidavit was defective, in not stating that defendant had *fully and fairly stated the case* to his counsel, and in not stating that his witnesses are *necessary*, and in not stating that he had *fully and fairly disclosed to his said counsel the facts which he expected to prove by each and every of his said witnesses, &c.*

JEWETT, Justice. Thought the counsel had mentioned defects enough; he would deny the motion with costs, *without prejudice*, and give the defendant's attorney a chance to try again.

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Peck agt. Wood.

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JACOB F. MILLER agt. JAMES H. HOOKER.

*One bill of lading, composed of any number of different articles, is considered but one item, on the trial of a cause. A motion for reference on one bill of lading, containing eleven different items, or articles, as requiring the examination of a long account, will be denied with costs. (See 2 Howard, 79.)*

*June Term, 1846.*

MOTION by plaintiff for a reference.

Plaintiff's affidavit stated that the action was assumpsit; the declaration contained three counts, and declared for work, labor and services, in carrying for the defendant, \*at his request, a quantity of flour and ashes, from [\*172] the city of Buffalo to the city of Troy. The plea was the general issue, and the trial of the cause would require the examination of a long account on the part of the plaintiff. Defendant showed that the plaintiff's bill of particulars contained *one bill of lading only*, and that was composed of *eleven* different items.

R. H. NORTHROP, *plaintiff's counsel and attorney.*H. HARRIS, *defendant's counsel and attorney.*

JEWETT, Justice. Held, that *one bill of lading* was but *one item*; no matter how many different articles it was composed of, it could not be considered as involving the examination of a long account on the trial.

Motion denied, with \$7 costs.

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JOHN M. PECK agt. JOHN WOOD.

Where defendant's attorneys moved for retaxation of costs with costs of retaxation, and of the motion, on the ground that no copy bill of costs and notice of taxation had ever been served on them; and in answer, plaintiff's attorney showed a regular service of the costs and notice of taxation; the defendant was allowed a retaxation on terms; to wit: paying costs of opposing the motion.

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Peck agt. Wood.

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*June Term, 1846.*

MOTION by defendant for retaxation of costs, with costs of retaxation and costs of motion.

Defendant's papers showed that this cause was brought to a hearing before David Buel, Jr., Esq., sole referee, at the city of Troy, county of Rensselaer (where the venue was laid), on the 9th, 10th and 11th days of September, 1845. On the 31st day of January, 1846, the referee reported in favor of the plaintiff \$73.87. On the 17th of March last judgment was perfected, and on the 18th of April execution issued, to the sheriff of Oswego, and received by him on the 22d April, with directions to collect \$230.10 with interest from the 17th April, 1846. One of the defendant's attorneys, in his affidavit, stated that no notice of taxation of costs in the cause had ever been served in any way or manner on the attorneys for the defendant, or either of them, nor had any such notice been received by them, or either of them, nor had the plaintiff's attorney served on defendant's attorneys, or either of them, nor had they received any notice of retaxation of costs, with stipulation to deduct from the execution such amount as should be struck out on retaxation.

On the part of the plaintiff it appeared, from an affidavit of Levi Smith, a clerk in the office of plaintiff's attorney, that on the 4th day of March last, he served the attorneys of [\*173] the defendant with a copy of the bill of costs in this cause, and notice of taxation for the 13th of March, before Abram B. Olin, Esq., recorder of the city of Troy, at 10 o'clock, A. M., which service was made by enclosing the bill of costs and notice of taxation in a wrapper, and directed to Messrs. McCarty & Watson, the defendant's attorneys at Richland, Oswego county, N. Y. (that being their reputed place of residence), and on the same 4th day of March deposited in the post-office at Troy, and the postage paid thereon. Job Pier-son, Esq., the counsel for plaintiff, stated in his affidavit, that on the 4th of March last, a copy of the bill of costs in the cause and notice of taxation were made by Levi Smith, a student at law in his office, and on the same day, by his direction,

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Flint agt. Morehouse.

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Smith enclosed the copy costs and notice of taxation in a wrapper, and directed to Messrs. McCarty & Watson, at Richland, Oswego county, N. Y., that being their reputed place of residence, and the place to which other papers in the cause had been directed and received by defendant's attorneys, and on the same 4th of March, Smith left his office with the package so directed, for the purpose of depositing it in the post-office in the city of Troy; he returned soon afterwards, and entered in his law register the service of the papers on that day, and that he paid ten cents postage thereon, which entry he believed correct.

H. HARRIS, *defendant's counsel.*

MCCARTY & WATSON, *defendant's attorneys.*

JOB PIERSON, *plaintiff's counsel.*

S. D. PIERSON, *plaintiff's attorney.*

JEWETT, Justice. Plaintiff shows the service of the costs and notice of taxation to be regular; the defendant can have a retaxation only, on terms. Motion for retaxation granted on payment of \$7 costs of opposing motion; the execution to be stayed in the mean time.

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JOHN M. FLINT, administrator, &c. agt. RICHARD H. MOREHOUSE.

*Time obtained for the purpose of surrejoinding is also time to demur.*

An order granted for further time to *surrejoin* and plaintiff's attorneys *demurred* to the defendant's joinder instead of surrejoinding; defendant's attorney refused to receive the *demurrer* on the ground that the order only gave time to *surrejoin*, and entered plaintiff's default for not surrejoinding. The default held to be irregular, and was with the subsequent proceedings set aside with costs. In law, time to *plead* is also time to *demur*. A *surrejoinder* is a *pleading*.

*June Term, 1846.*

MOTION by plaintiff to set aside default and subsequent proceedings, for irregularity, for not surrejoinding; and for leave to put in a demurrer.

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Flint agt. Morehouse.

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[\*174] \*The action was assumpsit; declaration contained the common counts for work and labor, goods sold and delivered, board, lodging, and other necessities furnished, &c. Defendant pleaded the statute of limitations and infancy together with the general issue, and gave notice (under the latter plea) of set-off. To the plea of the statute of limitations plaintiff replied, *first*, that the defendant was absent from the state, and this suit was brought within six years after his first return therein; *second*, a new promise; to the pleas of infancy, plaintiff replied that the goods furnished, &c., were necessities, and had entered a *nolle prosequi* as to the count for "account stated" and "money lent and advanced" and "had and received." To the first replication of the plaintiff the defendant had in substance rejoined, that at the time when the alleged causes of action in the declaration mentioned accrued, the intestate, Richard R. Hall, and the defendants were inhabitants of the state of New-Jersey and not elsewhere, that the indebtedness of the defendant to Hall arose in the state of New-Jersey, and not elsewhere, whilst they were residents of that state. That said Hall continued to be and remain such resident of the state of New-Jersey until he died, and that the defendant remained a resident of the said state until the said causes of action were, by the laws of the state of New-Jersey, effectually and for ever released and discharged; and for a long time thereafter, to wit, until the time of his return into this state as alleged in the plaintiff's replication, with an *absque hoc* as to the defendant's return with a said last named day; concluding with a verification. That to the other replications of the plaintiff, the defendant tendered an issue to the country. One of plaintiff's attorneys stated that the pleadings in the cause had been voluminous and intricate, and had required a great degree of care and attention in their preparation. The defendant's attorney obtained thirty days' time beyond that allowed by the rules of the court to rejoin to the plaintiff's replications, and when the rejoinder of defendant with a notice to surrejoin indorsed thereon were received by plaintiff's attorneys, they were engaged in the trial of, and



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Flint agt. Morehouse.

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attention to causes in the New-York and Brooklyn circuits; before the expiration of the time to surrejoin, plaintiff's attorneys obtained an order from Judge EDMONDS, for thirty days' further time to surrejoin, and served a copy on defendant's attorney, that having only hastily examined the rejoinders without having decided upon what kind of reply should be made to them, and not having had an opportunity to confer with the counsel in the cause, plaintiff's attorneys intended by the order to get leave to reply thereto \*by [\*175] way of demurrer, as well as by a technical surrejoinder, and supposed that they had done so; before the expiration of the time granted by the order, a demurrer to the first rejoinder of the defendant was prepared and served on defendant's attorney, who declined to receive it; and on the 30th day of April last entered plaintiff's default for not surrejoining to the first rejoinder; before the entry of the default, defendant's attorney returned the copy demurrer with a notice that he declined receiving it, and the plaintiff's attorneys again sent it to defendant's attorney, with a notice that they considered it pleaded pursuant to the rules and practice of this court. Plaintiff's attorneys stated that the demurrer was put in in good faith, and that a technical surrejoinder could not be well pleaded to the defendant's rejoinder or any other answer more, except by demurrer, so that justice might be done by this court to the plaintiff. A copy of the demurrer was annexed to the moving papers.

G. R. J. BOWDOIN, *plaintiff's counsel.*

WOODRUFF & GOODMAN, *plaintiff's attorneys.*

D. McMARTIN, *defendant's counsel.*

• J. H. RATHBONE, *defendant's attorney.*

Defendant's counsel insisted that *time given to surrejoin was NOT time to demur.*

JEWETT, Justice. Held that it was clear that the default was irregular; in *law*, time given to *plead* is *time to demur*, and so as to *surrejoinder*, that is a *pleading*. Motion granted with costs, and ten days given to plaintiff to serve demurrer.

## ISRAEL POST, JR. agt. OBADIAH S. HAIGHT.

A *precept* issued to collect costs granted on a motion, is irregular, if issued *within twenty* days from the date of the order granting costs. (*See 60 Rule.*)

*June Term, 1846.*

MOTION by plaintiff to set aside a precept, for irregularity.

On the *third* day of June, 1845, a motion was made by defendant, to the special term of this court, then in session, to consolidate this and another cause, which motion was granted, *with ten dollars costs*. On the *fifth* day of June last (1845), defendant's attorney issued a precept, by virtue of which the plaintiff was arrested and committed to jail, for the non-payment of the ten dollars costs, ordered on the motion to consolidate.

D. WRIGHT, *plaintiff's counsel.*

WM. B. LITCH, *plaintiff's attorney.*

N. HILL, JR., *defendant's counsel.*

A. HAIGHT, *defendant's attorney.*

Plaintiff's counsel insisted that the precept was irregular, it could not be issued until *twenty* days after the date of the order, under the 60 rule.

JEWETT, Justice. Held, that the precept was pre-  
[\*176] maturely issued, defendant *should* have waited *twenty* days under the 60 rule. Motion denied with costs, but no action for false imprisonment to be brought by plaintiff.

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THOMAS SMALL *et al.* agt. WILLIAM H. DEFOREST *et al.*

Where two referees met at the place of hearing about *ten* o'clock, A. M. (the hearing being noticed for 9 A. M.), the third referee not being present; and the two, without being sworn or organized, agreed to *keep the matter open* until *two* o'clock, P. M., to wait for the third referee; defendants' counsel at the time objecting that, after waiting an hour after the time noticed for hearing, a new

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Small agt. Deforest.

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notice should be given of the hearing; and at two o'clock, P. M., or after, all the referees met and organized, and proceeded to a hearing; *held*, that the proceedings were *regular*.

*Semble*. That two referees meeting at the hour noticed for hearing, without being sworn, may wait for or hold open the matter for the third referee *during the day*, and then all three organize regularly.

*June Term, 1846.*

MOTION by defendant to set aside report of referees, for irregularity.

This cause was referred at the Ulster circuit, held in March last, to three referees, James O. Linderman, Jacob H. DeWitt, and Peter Van Gaasbeck, Jr. On the 19th of March, plaintiffs' attorney noticed the cause for hearing before the referees for the 2d day of April, at 9 o'clock, A. M., at the house of J. Pardee in the village of Kingston. One of defendants' attorneys stated that he attended at the time and place mentioned in the notice, with the defendant, that none of the referees were then present; defendants' attorney then called upon one of the referees, to know whether they were to meet on that day, and was informed by him that Jacob H. De Witt, one of the referees, was absent from the village of Kingston, but he would see the other referee, and have him come to the place appointed for hearing; that about 12 o'clock, or within a very few minutes of that hour, the defendant and his counsel again attended at the place appointed for hearing, and James O. Linderman and Peter Van Gaasbeck, Jr., two of the referees, were then present with M. Schoonmaker, Esq., the attorney and counsel for the plaintiffs, but Jacob H. De Witt, the third referee, was not present. Defendants' counsel informed the referees and plaintiffs' counsel, that he wished to make an application to postpone the trial of the cause, he not then being ready to proceed. Mr. Schoonmaker objected to the referees who were then present taking any action in the premises, and stated that Mr. De Witt, the third referee, would probably be in by the 2 o'clock stage. The referees declined to take any steps in the cause in the absence of one of their number, nor could they adjourn to any time. Defendants' counsel stated \*that himself and the [\*177]

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Small agt. Deforest.

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defendant having waited from 9 o'clock, at which hour the hearing was noticed, until 12, then informed the referees and plaintiffs' counsel that they would wait no longer; and defendants' counsel objected to any further proceedings without a new notice; that he was compelled to leave home for a distant part of the county, and should not again appear at any meeting of the referees, without the cause being regularly noticed anew; accordingly defendants' counsel did leave about 1 o'clock, and was absent several days from home. He was informed that the referees, between the hours of two and three in the afternoon of the 2d day of April, again met at the place appointed for the hearing, and proceeded, in the absence of the defendant and his counsel, to hear the proofs and allegations of the plaintiffs, and made a report in their favor for six hundred and twenty-four dollars and seven cents.

On the part of the plaintiffs, M. Schoonmaker, Esq., stated that two or three days before the 2d of April, Mr. De Witt, one of the referees, was unexpectedly called away from home on important business; before he left he notified plaintiffs' counsel and one or more of his associate referees of his intended departure, informing them that he would be at home and ready to proceed with a reference at 2 o'clock on the 2d of April. Plaintiffs' counsel attended the place of hearing in the forenoon of the 2d of April, and alleged it was about 10 o'clock (and not as late as defendant's attorney stated in his affidavit), that Messrs. Van Gaasbeck and Linderman, two of the referees, were then present, and also the defendant, together with J. C. Forsyth, Esq., one of his counsel. Defendants' counsel applied for a postponement of the hearing until some future day, but did not produce, read, or furnish, at that time, any affidavits in support of his application. Plaintiffs' counsel could not consent to the postponement, unless good and sufficient cause was shown, by affidavit, that Mr. De Witt was then absent, but had engaged to be back at or about noon of that day, that defendants' counsel could not in the mean time prepare his affidavits for a postponement, and present them at the meeting of the referees after dinner. Plaintiffs'

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Small agt. Deforest.

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counsel did not object to the referees then present taking any action in the premises, but had objected to any postponement of the cause, unless sufficient cause was shown by affidavit on the part of the defendant; and Mr. Linderman, one of the referees, stated that he did not believe that two referees, before they were sworn, and in the absence of the third, could regularly adjourn over to any future day. Plaintiffs' witnesses were in attendance from the city of New-York, and plaintiff proposed that the referees should meet as soon \*as Mr. De Witt returned, at 2 o'clock, P. M., [\*178] and proceed with the examination of plaintiffs' witnesses, and in case defendants' witnesses were not then in attendance, an adjournment to some future day would be agreed upon for examination of defendants' witnesses. Such proposition was rejected by defendants' counsel. *The referees then present agreed to keep the matter open until two o'clock in the afternoon of that day*, and they would then meet, and in case Mr. De Witt should be present, they would organize and enter upon the discharge of their duties; and the defendant and his counsel were then informed of such arrangement. At about 2 o'clock, P. M., plaintiffs' counsel went to the house of Mr. De Witt, and found him at home, and informed him that the other referees were in waiting for him, and requested his attendance; he then went to the office of the defendants' attorneys, and found the defendant and J. H. Hasbrouck, one of his attorneys and counsel, then in the office; he informed them that Mr. De Witt had returned, and the referees were about organizing and proceeding to business, and requested their attendance; plaintiffs' counsel then proceeded to the place of hearing, and after waiting nearly an hour for the defendant and his counsel, and neither of them appearing, all three of the referees were sworn, and proceeded to hear and examine the witnesses on the part of the plaintiff, no one appearing for defendant; and subsequently made their report as stated by defendants' papers.

G. R. J. BOWDOIN, *defendants' counsel.*

FORSYTH & HASBROUCK, *defendants' attorneys.*

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 Brown agt. Ferguson.
 

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D. McMARTIN, *plaintiffs' counsel.*

M. SCHOONMAKER, *plaintiffs' attorney.*

Defendants' counsel insisted that *two* referees before organization had not power to adjourn, and consequently had no power to postpone or keep open the matter for a number of hours after the hour designated in the notice of hearing. The general rule in the city of New-York was, to wait *one* hour after the time designated in the notice, and, if all the referees did not then appear and organize, the cause was renounced for hearing at another time.

JEWETT, Justice. Said, that in the country they waited all day sometimes, to get all the referees together, and get them organized; he thought there was nothing irregular in the plaintiffs' proceedings. Motion denied with costs.

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CLARISSA BROWN agt. SAMUEL S. FERGUSON.

Where an execution was issued out of *this court*, sealed with the *seal of the court of common pleas* of the county of Putnam, and notice of its withdrawal from the sheriff was served by \*plaintiff's attorneys on defendant's attorney *before any levy was made*, and before defendant's attorney had completed his papers for motion to set it aside for irregularity; although defendant's attorney had, before receiving such notice, made an affidavit, and procured the circuit judge's order, staying plaintiff's proceedings on the execution, and served a copy of the order on the sheriff. *Held*, that the motion was *unnecessary*, and was denied, without costs to either party.

*June Term, 1846.*

MOTION by defendant to set aside execution, for irregularity.

There was a copy of the execution in this cause attached to the moving papers, a *seal of the court of common pleas of the county of Putnam* was stated to be attached to the original, and so marked on the copy, and the motion was made on the ground that the execution was issued without the *seal of the court*. The moving papers stated that the execution was delivered to the sheriff of Westchester, on the 4th of April, and the sheriff stated to Mr. Mills, the law partner of defendant's

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Brown agt. Ferguson.

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attorney, that he had instructions from plaintiff's attorney to proceed and collect the amount of it. On the 21st of April, about 2 o'clock, P. M., defendant's attorney caused to be served on the sheriff a copy of an order made by the circuit judge of the second circuit, staying proceedings upon the execution; about 4 o'clock, P. M., of the same day, one of plaintiff's attorneys served a notice on defendant's attorney, of the *withdrawal* of the execution from the sheriff; defendant's attorney then informed him that he had, in the forenoon of that day, prepared and sworn to moving papers to set aside the execution, and they were then copying to serve on plaintiff's attorneys, and demanded that his costs should be paid for preparing the papers for the motion, which plaintiff's attorney declined to do. Defendant's attorney then informed plaintiff's attorney that he should disregard the notice of withdrawal, and go on to make the motion. On the part of the plaintiff, D. C. Briggs, Esq., one of the plaintiff's attorneys, stated that the first intimation he had, or, as he believed, either of the plaintiff's attorneys had, of any error in the execution, was at the Westchester circuit in the afternoon of the 21st of April last; that J. W. Tompkins, Esq., the defendant's attorney, was then engaged as counsel in summing up a cause; he (Briggs) spoke to J. W. Mills, Esq., the law partner of defendant's attorney, about the execution, when Mills informed him that they proposed to move to set it aside, but the affidavits and papers for the motion were not then prepared, and that Briggs had better withdraw the execution. A few minutes after conversing with Mills, he saw the sheriff of Westchester, and examined the execution then in his hands, and on close inspection discovered that the seal attached was not the seal of this court, and immediately thereafter withdrew \*the [\*180] execution from the sheriff before any levy had been made, as he was informed by the sheriff, and prepared a notice thereof, during all which time Tompkins continued addressing the court and jury, and within five minutes after Tompkins had ceased speaking he served the notice of withdrawal upon him, which was about one hour before the service of the

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Dutcher agt. Wilgus.

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judge's order, staying proceeding and notice of this motion, on plaintiff's attorneys. Briggs denied that Tompkins ever demanded of him the costs for preparing the papers for the motion.

J. W. TOMPKINS, *defendant's counsel and attorney.*

A. TABER, *plaintiff's counsel.*

LEE & BRIGGS, *plaintiff's attorneys.*

JEWETT, Justice. Thought there was no *necessity* for this motion; the execution was withdrawn, and notice given *before any levy* was made. The defendant's papers were not fully prepared for the motion, when the notice of withdrawal was served, as appears on both sides. Motion denied, without costs to either party.

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JOHN D. DUTCHER agt. CHARLES WILGUS.

On a motion for reference, the affidavit must show *clearly* that *all* the issues are joined in the cause, as well those in *law*, as in *fact*, where the pleadings show the necessity of such issues.

*June Term, 1846.*

MOTION by plaintiff for reference.

It was objected by defendant's counsel, that the plaintiff's affidavit was insufficient, for the reason that it did not state *sufficiently* that issue was joined. The affidavit of plaintiff read as follows: "being duly sworn, says, that he is the plaintiff in the above entitled cause; that the declaration in said cause is in assumpsit upon a promissory note given by the defendant to the plaintiff, and upon an account for work and labor performed by the plaintiff for the defendant, and for goods, wares and merchandise sold by the plaintiff to the defendant. That the venue in said cause is laid in the county of Albany, that the pleas in said cause, are: 1st. The general issue, 2d. Set-off, 3d and 4th. Certificate and discharge as a



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Snyder agt. Olmsted.

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bankrupt; to which the plaintiff replied a new promise made by the defendant to the plaintiff to pay the demand for which this suit is brought, subsequent to such discharge and certificate, and to which the defendant put in a general rejoinder traversing the replication; that *an issue of fact* was joined in said cause on the 16th day of May instant, and this deponent further says that the trial of this cause will require the examination of a long account on the part of this deponent."

\*J. H. COLLIER, *plaintiff's counsel*. [\*181]

H. L. PALMER, *plaintiff's attorney*.

R. W. PECKHAM, *defendant's counsel*.

O. S. & H. A. BRIGHAM, *defendant's attorneys*.

JEWETT, Justice. Denied the motion with costs, on the ground that it did not appear sufficiently, from the affidavit, that issue was joined *in law*, which was requisite, as well as in fact.

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ALEXANDER SNYDER agt. CHARLES A. OLMSTED.

Where the venue in an affidavit was "Albany county," and it was sworn before and the jurat subscribed by a "Judge of Rensselaer county courts, counselor, &c.;" *held*, that the affidavit could not be read, on motion, on the ground that the officer, before whom it purported to have been sworn, had no jurisdiction to take it. (2 How. 86, 127.)

*June Term, 1846.*

MOTION by defendant to set aside proceedings on the part of the plaintiff, &c.

The principal affidavit upon which the motion was founded was made by defendant's attorney; the venue in the affidavit was "Albany county," and was sworn before and the jurat signed by "J. Romeyn, judge Rensselaer county courts, and counsellor in supreme court."

D. WRIGHT, *defendant's counsel*.

L. J. LANSING, *defendant's attorney*.

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Van Auken agt. Stewart.

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N. HILL, *plaintiff's counsel.*

E. PEARSON, *plaintiff's attorney.*

Plaintiff's counsel objected to the reading of the affidavit, on the ground that the officer, before whom it purported to have been sworn, had no jurisdiction to take it; *cited 2 How. 86, 127.*

JEWETT, Justice. Sustained the objection, and denied the motion with \$7 costs, without prejudice.

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JESSE VAN AUKEN *et al.* agt. JAMES STEWART.

An affidavit, for the purpose of moving to change the venue, should state the *towns* as well as the county in which the witnesses reside. (1 *How. 195*; 2 *How. 89.*)

*June Term, 1846.*

MOTION by defendant to change the venue from New-York to Delaware.

The affidavit upon which this motion was founded did not state the *towns* in which the witnesses resided; it stated only that they resided in the county of Delaware.

Plaintiffs' counsel objected to the sufficiency of the affidavit, and *cited 1 How. 195*; 2 *How. 89.*

A. TABER, *defendant's counsel.*

JOHNSON & ANDREWS, *defendant's attorneys.*

G. R. J. BOWDOIN, *plaintiffs' counsel.*

R. TEN BROECK, *plaintiffs' attorney.*

JEWETT, Justice. Sustained the objection, and denied the motion with \$7 costs.

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Curtis agt. Poppino.

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\*CHARLES CURTIS agt. SAMUEL S. POPPINO and [\*182]  
JOHN J. POPPINO, executors, &c.

Where, on the trial of a cause, it was proved that an acting executor refused to pay a note of \$700, given to plaintiff, the creditor, signed by the testator as surety for another person, and replied that he would not pay him until compelled by law to do so, and subsequently executed a writing to plaintiff to the effect, "that the executors request the holder of the note to delay enforcing collection to enable the principal to provide means to pay it, and we certify that the same has been duly presented and is recognized and treated as a demand against said estate," and it was also proved that sufficient assets came to the hands of the executors. *Held*, that the executors *were liable for costs*, although the executors swore that, after the execution of the writing, they learned and were advised that they had a good defence to the note on the ground of usury. A verdict was rendered for the plaintiff for \$491.21, the balance due on the note.

*June Term, 1846.*

MOTION by the plaintiff for costs in this suit and costs of motion against the defendants, to be levied of the property of Daniel Poppino, deceased.

This was a suit brought on a promissory note, executed to plaintiff by John Borrodaile, Daniel Poppino and Robert Alsop, the two last named alleged to be sureties. The word "security" was appended to the name of Robert Alsop only: defendants pleaded general issue. The cause was tried at the Wayne circuit on the 29th of April, 1846, and a verdict rendered for plaintiff, against the defendants, of \$491.21, the balance due on the note, which was originally \$700. B. WHITING, circuit judge, gave a certificate, which was annexed to plaintiff's moving papers, which read as follows: (Title of the cause.) "Wayne circuit, April 29, 1846. I hereby certify that it appeared and was proved, on the trial of this cause, on the part of the plaintiff, that this suit was brought upon a promissory note executed by Daniel Poppino, deceased, and others, to the plaintiff, dated July 24, 1840, for \$700, payable on the first day of October then next, upon which there was due and unpaid, including interest computed to May 4, 1846, the sum of \$491.21; that the defendants are the executors of

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Curtis agt. Poppino.

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the said Daniel Poppino, deceased; that letters of administration upon the personal estate of the said Daniel Poppino, deceased, were taken out by the said defendants in the year 1841, that the personal property of the deceased which came into the hands of said executors amounted to \$1000 or more; that the value of the real estate of the deceased was some \$3000 or \$4000; that no inventory of the personal or real estate of the said deceased was ever made or filed; that about the first of November, 1845, the said plaintiff presented his said demand to the said Samuel S. Poppino, one of the said executors, and made demand of payment thereof of him, the said Samuel S. Poppino; that the said Samuel S. Poppino refused to pay the same, and replied to said plaintiff that he would not pay him, the said plaintiff, until compelled [\*183] by law "to do so." Plaintiff's papers contained a copy of a writing signed by Samuel S. Poppino, which read as follows: "Whereas Daniel Poppino, in his lifetime, became a party to the annexed note, as a surety-maker with John Borrodaile, to whom it belongs to pay said note; and whereas the said Borrodaile is not now in a situation to pay said note, the executors of the estate of the said Daniel Poppino hereby request the holder of said note to delay enforcing collection thereof, to enable the said Borrodaile to provide means to pay same; and they hereby certify that the same has been duly presented, and is recognized and treated as a demand against the said estate. Dated March 6, 1848. (Signed) S. S. Poppino, executor of Daniel Poppino, dec'd."

Defendants' papers stated that Daniel Poppino died on the 4th of July, 1841; that just previous to his death, he informed Samuel S. Poppino that there were no debts against him. The heirs and legatees were agreed in the amount and disposition of the property left by the deceased, and did not wish to incur the expense of an appraisal, and which they were advised by the surrogate was not necessary under those circumstances. The deceased left but a small amount of personal property; and Samuel S. Poppino, who was the acting executor, never received or realized to exceed about \$500

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Curtis agt. Poppino.

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from the assets of the estate. It turned out that there were demands existing against the estate, which the executors paid, amounting to between \$300 and \$400, besides their claim; and there would not probably be realized over about \$150 from the personal assets of the estate. The writing executed by Samuel S. Poppino, referred to in the moving papers, was executed at the request of Borrodaile, who called upon the executors with the plaintiff, and informed them that Borrodaile had made an arrangement with the plaintiff to give him time to pay the note; which the plaintiff was willing to do, if Samuel S. Poppino would sign the writing. Subsequently to the execution of the writing, Borrodaile informed S. S. Poppino that the note was usurious and void; and, if prosecuted, he (Borrodaile) should resist the payment of it on that ground. S. S. Poppino stated that no proposition was ever made to refer the claim; that, if such proposition had been made, he would have been willing to have referred it. The reason why he refused to pay the note was, because he was advised by Borrodaile that it was usurious and void, and, if prosecuted, he (Borrodaile) should take the advantage of it, and advised Poppino to do the same. On stating the case to counsel, he, Poppino, was advised that the note was void, and he therefore felt bound to resist the payment of it. As a further reason for \*refusing to pay it, he had no [\*184] assets of the estate to pay it with, or any part of it. Borrodaile was unable to pay the note, and nothing could be collected of him. No real estate of Daniel Poppino, deceased, was devised to the executors.

M. T. REYNOLDS, *plaintiff's counsel.*

O. H. PALMER, *plaintiff's attorney.*

W. F. ALDRICH, *defendants' counsel and attorney.*

JEWETT, Justice. Held that the defendants were liable for the costs as executors, and granted the motion with \$10 costs. It was apparent from the whole case that it came within the statute; "that the claim had been presented, and payment was unreasonably resisted or neglected."

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Holmes agt. Van Sickle.

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## JOSEPH A. HOLMES agt. PETER VAN SICKLE and JACOB VAN SICKLE.

A suit was commenced by declaration against two defendants; and before service on them, they executed a bond and warrant of attorney to plaintiff, including the amount of principal and interest of the demand claimed, and \$6.50, being the amount of costs claimed by plaintiff's attorney; and the defendants were to pay the sum thus liquidated in a given time. And as the weight of testimony appeared, defendants did pay the amount within the time, and took a receipt from plaintiff's attorney, "*to apply the amount on the judgment.*" Plaintiff's attorney had, just previous to such payment, sent off a judgment record to be signed and filed; and as appeared on the part of the plaintiff, plaintiff's attorney claimed of defendants more costs in consequence of entering up judgment; and over two years afterwards, plaintiff's attorney issued a writ of *scire facias* on the judgment; and on a motion to set aside the *scire facias*, and that the plaintiff acknowledge satisfaction of the judgment, it was granted with costs, on the ground that it appeared that defendants paid all that they understood to be due, and within the time agreed upon; and it would seem that the defendants were deceived in giving a bond and warrant of attorney, instead of a *cognovit*. The warrant of attorney contained a clause that execution might issue "at any time or times, without any revival."

*Semble.* Where a warrant of attorney contains a clause that execution may issue at any time or times without any revival, it is unnecessary to issue a *scire facias* where execution had not been issued within two years from the entry of judgment.

*June Term, 1846.*

MOTION by defendants to set aside writ of *scire facias*; also that the plaintiff satisfy the judgment of record with costs.

It appeared on the part of the defendants, that in September, 1843, a suit was commenced in favor of *Holmes agt. the Van Sickles* (by filing a declaration), on a note of \$50. dated Sept. 15, 1842; payable Sept. 1, 1843, with interest. On the 9th of Sept., 1843, Stephen Wheeler, clerk in the office of plaintiff's attorney, called to serve declaration on defendants; and they executed and gave him a bond and warrant of attorney, conditioned to pay \$60. (The note being \$50, interest one year \$3.50, and costs which plaintiff's [\*185] attorney claimed, \$6.50, making \$60.) Wheeler gave the defendants a certain time (not recollected by them), to pay the \$60, which should discharge the claim.

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Holmes agt. Van Sickle.

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On the 27th September, 1843, Jacob Van Sickle paid Wheeler \$60, as he and Peter both swore, *in full of the whole demand*, and both swore that it *was within the time* given them by Wheeler to pay that amount, which should be in full. Wheeler gave a receipt for the \$60, "to apply on the above mentioned judgment," dated *Sept. 27, 1843*. No judgment had *then been entered*, but on the 3d Oct., 1843, judgment was signed by the recorder of Rochester, and on the 6th Oct., 1843, judgment was perfected; on the 24th Feb., 1846, Wheeler wrote to defendants by mail, saying there was a balance due on the judgment, which they must call and pay. This letter defendants did not receive until after the service of *scire facias*. A copy of the warrant of attorney was annexed to defendants' papers, and contained a clause authorizing execution to issue "*at any time or times thereafter, without any revival of such judgment or otherwise.*" The affidavits of both defendants and defendants' attorney were essentially to the foregoing facts. On the part of the plaintiff it appeared, that on the 9th of Sept., 1843, when Wheeler called on one of the defendants (he could not recollect which), and informed him he had come to serve a declaration on him, the defendant expressed a very great aversion to being sued, and assured Wheeler that if he would return without serving upon defendants the declaration, he, the defendant, would call at Mr. Palmer's office the then next week and pay the demand upon which the suit was brought and all the costs. Wheeler then informed the defendant that the defendants could execute a bond and warrant of attorney, if they preferred to do so to having the declaration served upon them. Defendant then inquired the nature of the bond and warrant of attorney, and Wheeler explained it to him, and told him if the defendants chose to execute a bond and warrant of attorney, they could have the *then next week* to pay the money in; to which defendants assented, and the writings were executed. Wheeler then agreed that, if the defendants paid the \$60 and interest the then next week, no judgment should be entered on the bond and warrant of attorney. Wheeler stated that the money *was not paid within the*

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Holmes agt. Van Sickle.

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*time agreed upon.* Palmer, the attorney for plaintiff, made out the judgment record on the bond and warrant of attorney, and took it with him to Rochester to get it signed a day or two before the defendants called to pay the money. When one of the defendants offered to pay the \$60, Wheeler informed him that the time for defendants to pay had elapsed, and a judgment had been entered against them. Defendant said [\*186] he was disappointed in getting \*the money; he was sorry Mr. Palmer had made them more costs, but as he had not kept the agreement on his part, he could not find any fault; he asked Wheeler how much costs there was; Wheeler told him he could not tell, as the papers had not returned from the clerk's office; defendant said he would like to pay \$60 on the judgment, and the balance he would call and pay in a few days. Wheeler took the \$60, and gave defendant a receipt for it. On the 24th of Feb., 1846, Wheeler notified defendants to pay the balance due on the judgment; and on the 31st March, 1846, he issued *scire facias* upon the judgment; soon after the *scire facias* was issued, one of the defendants called on him and said he had forgotten about it, or he should have paid it before, and inquired how much he must pay to settle the whole matter; Wheeler (who was attorney for plaintiff in the *sci. fa.* suit) informed him he must pay the balance of the judgment after deducting the \$60, and pay the sheriff's fees for serving the *sci. fa.*; that defendant left for the avowed object of ascertaining the amount of sheriff's fees and paying them, and then to pay the amount due on the judgment, but did not again return. Palmer, the attorney on the original judgment, stated that on the 23d September, 1843, he made up a judgment on the bond and warrant of attorney, and took it with him to Rochester, where he went to attend the circuit, which commenced on the 25th September; that being engaged during the first days of the circuit, did not get the record signed until the 3d of October. The record was signed and sent off to the clerk's office, before he had any information that any money had been paid by defendants on the demand.



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Hibbard agt. Hoag.

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M. T. REYNOLDS, *defendants' counsel.*S. B. JEWETT, *defendants' attorney.*S. WHEELER, *plaintiff's counsel and attorney.*

JEWETT, Justice. Granted the motion, setting aside the *sci. fa.*, and that plaintiff acknowledge satisfaction of the judgment with \$10 costs; on the ground that the defendants paid all that they understood to be due, and within the time agreed upon, as appeared by their affidavits; and it seemed, that they paid all which was in fact due. It also appeared that the defendants were deceived, in giving a bond and warrant of attorney, instead of a *cognovit*, not knowing that the expenses would be increased by so doing.

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CLARK HIBBARD agt. DAVID HOAG, impl'd with Edward Sims.

Where plaintiff brought a suit in this court on a justice's judgment, and on the same day, but subsequent to the service of the declaration, defendant brought an appeal on the judgment to the common pleas, and afterwards pleaded to plaintiff's declaration \*in this court, the general issue and [\*187] notice subjoined of bringing the appeal and the pendency thereof on the judgment; and on motion of defendant for judgment as in case of nonsuit, by reason of plaintiff's failing to notice, and bring the cause to trial at a subsequent circuit. *Held*, that the plaintiff might stipulate on payment of costs of motion.

*June Term, 1846.*

MOTION by defendant Hoag, for judgment as in case of nonsuit.

Defendants' papers stated that the venue was laid in the county of Onondaga; that issue was joined as to defendant Hoag, on the 13th of February last, and as to the defendant Sims, on the 16th of February last; that a circuit was held in and for Onondaga county, on the 2d Monday of April last; that this cause was not noticed for trial at that circuit, and that younger issues were tried, and this cause might have been tried.

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Hibbard agt. Hoag.

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Plaintiff's papers stated that the action in this cause was founded on a judgment recovered and rendered in a justice's court of Onondaga county for \$100 damages, that the defendant Hoag resided in Onondaga county, but the defendant Sims did not reside in that county; the judgment was rendered in favor of the plaintiff against the defendant Hoag, impleaded with Sims on the 20th January last, and on the 30th day of January the declaration by which this suit was commenced was served on defendant Hoag, that on the same day, but at some time *subsequent* to the service of the declaration, Hoag brought an appeal on the justice's judgment to the court of common pleas of Onondaga county, and which appeal was yet pending and undetermined. On the 9th of February last, the defendant Hoag appeared by attorney, who served notice of retainer, in this cause, on plaintiff's attorneys, and on the 14th of February defendants' attorney served on plaintiff's attorneys a plea of the general issue and notice subjoined of bringing the appeal, and the pendency thereof, on the judgment.

H. C. VAN SCHAAACK, *defendants' counsel and attorney.*

N. HILL, JR., *plaintiff's counsel.*

WILKINSON, FLEMING & BAGG, *plaintiff's attorneys.*

Plaintiff's counsel insisted that the judgment before the justice was not extinguished by the appeal. The appeal might be *discontinued* by the appellant, or it might be *dismissed* by the common pleas, and then the judgment before the justice would be in full force. (6 *Hill*, 612.) The cause of action was not *destroyed* but *suspended*.

The defendant had not so pleaded as to avail himself of the appeal. He should have pleaded in *abatement*. His papers showed he had only pleaded in *bar*. (2 *Johns. Cases*, 312.) Hence the plaintiff might stipulate.

JEWETT, Justice. Granted the motion, unless plaintiff stipulated and paid the costs of the motion.

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Hurd agt. Merritt.

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\*SAMUEL W. HURD agt. JOHN J. MERRITT. [\*188]

A plaintiff may collect, on execution, the amount of his judgment *and interest* from the time of docketing, where defendant brought a writ of error on the judgment to the court for the correction of errors, and the writ was dismissed with costs, and the court awarded *that the defendant in error recover interest on the judgment during the pendency of the writ of error, by way of damages, for the vexation, delay, &c., caused by bringing the writ.*

*It seems* that it is competent for the court for the correction of errors to make such order, and the defendant in error may enforce it, although he levies the amount of his judgment in this court *with interest* from the time of docketing. (2 Cow. 51, 400; 10 Wend. 74.)

*June Term, 1846.*

MOTION by defendant to correct the indorsement on the plaintiff's execution, issued in this cause, &c.

This was a suit brought to recover of the defendant, damages for diverting a stream of water. From the defendant's papers, it appeared that the cause was referred to three persons, as referees, who were to proceed in the same manner as if the action was properly referable. The referees made their report against the defendant, for \$966.12½, on the 26th day of August, 1843; and on the 1st day of June, 1844, plaintiff entered up judgment for \$1,331.83 damages and costs. The defendant brought a writ of error on the judgment to the court for correction of errors, which writ was subsequently quashed, and an order made by the court that the defendant in error recover against the plaintiff in error, his costs to be taxed, and also *interest on the amount of the judgment of the supreme court, from the 23d of April, 1845, by way of damages, for the delay and vexation, caused by the bringing of the writ of error.* Plaintiff issued execution on the judgment in the supreme court, for the amount of the judgment, and directed, by indorsement thereon, that *interest* should be collected from the 1st of June, 1844, upon the amount due upon the judgment. Defendant's papers also stated, that the plaintiff had commenced a suit in this court, on the bond executed on the allowance of the writ of error, to recover thereon the costs

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Hurd agt. Merritt.

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*and interest*, awarded by the court for the correction of errors. Defendant's counsel offered plaintiff's attorney to pay the judgment and the interest and costs awarded by the court of errors, but the offer was declined, as the plaintiff required the payment of the principal of the judgment, and of the *interest thereon from the time it was docketed*, and also the *interest awarded by the court for the correction of errors*, claiming that the plaintiff was entitled to *double interest* on the judgment, from the 23d of April, 1845 (the day the writ of error was served), to the time of the decision of the court of errors, being the time the collection of the judgment was stayed by the writ of error.

[\*189] \*Plaintiff's papers did not alter the principal facts in the case; they gave the history of the whole proceedings minutely, and alleged that the allowance of interest to plaintiff on the judgment, by the court of errors, was by way of smart money, and as well for the purpose of indemnifying the plaintiff for his trouble and expenses in the writ of error suit, as for punishing the defendant for his abuse of the process of the court; and it was intended by the court to be given to plaintiff, independent of his right to recover interest on the judgment in this court.

W. M. MITCHELL, *defendant's counsel*.

MINOTT MITCHELL, *defendant's attorney*.

THOMAS NELSON, *plaintiff's counsel*.

WILLIAM NELSON, *plaintiff's attorney*.

JEWETT, Justice. The plaintiff was entitled to direct interest to be collected on his judgment, from the time it was perfected (1st day of June, 1843). (*Laws of 1844, chap. 324.*)

The question whether the plaintiff is or not *also* entitled to the *interest* on his recovery, awarded by the court for the correction of errors, by way of damages on the dismissal of the writ of error, does not arise on this motion; but if it did, I have no doubt but that it was competent for that court to make such order, and that the plaintiff may enforce it, although he levies the amount of his judgment in this court, with in-

The People, *ex rel.* Michael Cooney, agt. The Judges of the Common Pleas.

terest from 1st of June, 1844 (2 *Cow.* 51, 400; 10 *Wend.* 74).  
Motion denied, with \$7 costs.

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THE PEOPLE, *ex rel.* MICHAEL COONEY, agt. THE JUDGES OF  
THE COMMON PLEAS of the County of Rensselaer.

It is not *necessary* for a justice of the peace, or other officer, to *endorse their approval* of a bond given on bringing a writ of *certiorari* from the common pleas; although it is well that justices should certify their approval in all cases upon such bonds.

The filing of the bond and return to the writ of *certiorari* by the justice is sufficient evidence of his approval of the *sufficiency* of the sureties (2 *Cow.* 506).

The statute (2 *R. S.* 256, § 172) does not require the justice to *certify* or file his approval, as it does in the case of an appeal bond (*Ib.* 259, § 189).

An order of a common pleas quashing a *certiorari*, on the ground that the bond was not endorsed or certified *approved* by the justice or some other proper officer, is erroneous, but can not be corrected by *mandamus* (20 *Wend.* 658).

*June Term, 1846.*

MOTION on behalf of the judges to vacate the rules allowing an alternative and peremptory *mandamus*, and all proceedings therein, and to quash the writs.

In May term, 1845, of the Rensselaer common pleas, a writ of *certiorari*, bond, and return thereto by a justice of the peace of Rensselaer county, was filed with the clerk of the court of common pleas of \*Rensselaer county, where- [\*190]  
in Michael Cooney was plaintiff in error, and John Fitch defendant in error.

In September term, 1845, of the common pleas, Fitch, the defendant in error and attorney in person, moved to quash the writ, on the ground that there was *no approval of the bond* on file, either by the officer who allowed the writ, or the justice who made the return, and no endorsement of approval upon the bond whatever. The motion was opposed by the counsel for Cooney; and on the 18th of October, 1845, the court of common pleas made an order, "that the writ of *certiorari* be quashed, vacated and held for nought, unless the plaintiff in error filed the usual bond therein, with one or more

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sufficient sureties to be approved by the court (common pleas); and also, within twenty days after the entry of the order, pay to defendant in error \$10 costs of the motion." The order was made upon the ground that there was *no approval of the bond* on file with the certiorari. On the 12th of December, 1845, an *ex parte* motion was made to this court, at special term, by John Koon, Esq., *relator's* counsel; and an order granted that a writ of alternative mandamus issue to the judges of Rensselaer common pleas, commanding and requiring them to vacate the order made by them on the 18th of October, 1845, quashing the writ of certiorari. At the succeeding February special term of this court (at which time the alternative writ was returnable), on producing due proof of the service of the alternative writ on the judges of the common pleas in open court, and on producing proof to this court that no return had been made to the alternative writ, an order was made on the 12th of February, 1846: whereupon the judges of the common pleas, in obedience to the command in the peremptory writ, by a rule entered in the minutes of the court of common pleas, vacated the rule quashing the writ of certiorari. Fitch, the defendant in error in the certiorari suit, stated that he was ignorant of the issuing of either the alternative or peremptory writ of mandamus, until the 17th of February, 1846. This motion was made for the last April special term, and put over to this term by consent.

JOHN FITCH, *defendants' counsel and attorney.*

JOHN KOON, *counsel and attorney for relator.*

JEWETT, Justice. I am of the opinion that the filing of the bond and return to the writ of certiorari, by the justice, was sufficient evidence of his approval of the *sufficiency* of the sureties (2 *Cow.* 506). The statute (2 *R. S.* 256, § 172) [\*191] does not require the justice to certify or file his *\*approval*, as it does in the case of an appeal bond. (*Ib.* 259, § 189.) Although it is well that justices should certify their approval in all cases upon such bonds. The order, therefore, of the common pleas, quashing the certiorari, was erroneous,

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Stiles agt. Spaulding.

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but it cannot be corrected by *mandamus*. (20 *Wend.* 658.) Motion to vacate the rules, allowing the writs of alternative and peremptory *mandamus*, and to set aside said writs, granted, but without costs to either party.

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SYLVANUS STILES, plaintiff in error, agt. ERASTUS SPAULDING  
*et al.*, defendants in error.

It is ~~unnecessary~~, on bringing a writ of error from this court to the common pleas, on a judgment rendered on a *certiorari* brought upon a justice's judgment, to file or deliver with the writ of error a *certificate of counsel*, pursuant to 2 *R. S.*, p. 597. A certificate of the first judge of the common pleas, pursuant to the act of 1836, chapter 794, is the proper certificate to file in *such a case*.

*June Term, 1846.*

MOTION by defendants in error to quash writ of error.

It appeared, from the papers of defendants in error, that the record of judgment in this cause was filed with the clerk of the court of common pleas of the county of St. Lawrence, on the 18th of February last. On the same day plaintiff's attorney served on defendants' attorney a notice of the allowance of a writ of error, to the court of common pleas from this court, and of bail in error with their names and additions. The notice did not contain any statement of the time of the *teste* nor *return* of the writ; and at the time of filing the writ and the bail in error with the clerk of the common pleas, there was no *certificate of counsel* filed, or delivered to the clerk, nor was there any certificate of counsel subsequently filed or delivered; there was no other certificate filed or delivered, except the certificate of the first judge of the county. After the attorney for defendants in error had made an affidavit and procured an order staying proceedings for this motion, he received a notice from the attorney of plaintiff in error, giving the time of the *teste* and *return* to the writ of error.

From the papers on the part of the plaintiff in error, it appeared that this was a writ of error from this court to the

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Stiles agt. Spaulding.

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court of common pleas of the county of St. Lawrence, to remove the record and proceedings in the cause, of the court of common pleas, on reversal, on certiorari, of a judgment rendered by a justice of the peace, in which justice's court the cause originated: that within thirty days after the record of judgment of the court of common pleas was filed, a writ of error and all the other proceedings to remove the [\*192] record of the common pleas were duly filed \*with the clerk of the court of common pleas, and with the writ of error and proceedings was also filed a certificate of John Fine, Esq., first judge of the court of common pleas, who was a counselor of this court, and who was present and presiding at the hearing and argument of the cause on certiorari, who examined the record and proceedings in the cause, stating that, in his opinion, it was a proper cause to be removed by writ of error to this court; and on the same day of filing the writ, &c., with the clerk of the court of common pleas, plaintiff's attorney served a notice on the defendants' attorney, in which was omitted to be stated the *teste* and *return* of the writ; but notice was subsequently served, giving the time of the *teste* and *return* as stated in defendants' papers.

J. H. COLLIER, *defendants' counsel.*

WM. C. COOK, *defendants' attorney.*

F. H. HASTINGS, *plaintiff's counsel.*

THOS. V. RUSSELL, *plaintiff's attorney.*

JEWETT, Justice. The common pleas reversed a justice's judgment on certiorari, from which a writ of error is brought, notice of which was served on the attorney for the defendant in error prior to the service of notice of this motion. The plaintiff in error did not procure and file with the clerk of the common pleas certificate of counsel, pursuant to 2 R. S., p. 597, § 32. This was unnecessary in *this case*. The plaintiff in error procured and filed a certificate of the first judge of the common pleas, pursuant to the act of 1836, chap. 794. Motion denied with \$7 costs.



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Coit agt. Roach.

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## WILLIAM COIT agt. ALFRED ROACH and HARVEY WEED.

Where the cause of action *is specified* in the writ, the plaintiff nevertheless is not bound to declare against *all* the defendants, *unless special bail is required*. (16 John. 44; Grah. Pr. 192, 2d. ed.) In an action of *replevin* against two defendants, where the property was taken, and special bail put in, and but one of the defendants was summoned: *it seems* that the plaintiff was bound to declare against the defendant served; the property having been taken, *special bail* was not required.

*June Term, 1846.*

MOTION by plaintiff to set aside the proceedings on the part of the defendants, or the defendant Roach, for irregularity.

It appeared from plaintiff's papers that this was an action of *replevin*. The writ was issued to the sheriff of the city and county of New-York, commanding him to replevy the property therein mentioned (consisting of some articles of household furniture), and to summon the defendants to appear on the 1st Monday of July, 1845. The sheriff returned the writ, certifying that he had executed the writ as to the defendant Roach, but that he was unable to find the defendant Weed. The bond required by the statute had been executed to the defendant Roach, and the sureties justified, but plaintiff \*had not declared against Roach, in consequence of the defendant Weed not having been brought in. On the 2d day of January last, the attorney for Roach served a notice, requiring the plaintiff to declare before the end of the next succeeding term of this court, &c. On the 4th of February following, the default of the plaintiff for not declaring, and a rule for judgment of *non-pros*, was entered. Plaintiff stated that he did not consider that it would be regular and according to the practice of the court, to declare against one defendant, until the other was brought in, or had appeared. The action was founded upon a wrongful distress of property, on which the plaintiff had a mortgage, made under the warrant of the defendant Weed; that Weed was the only responsible defendant; the attorney for Roach was employed by Weed to defend for Roach, and the attorney

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Coit agt. Roach.

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had repeatedly refused to appear for Weed, when requested to do so. Plaintiff stated he had always been ready and anxious to declare as soon as the defendant Weed could be brought in; he also stated that he was a counsellor of this court, and from a full knowledge of the facts, he believed he had a good and meritorious cause of action.

It appeared from defendants' papers, that defendants' attorney served a notice of retainer on plaintiff's attorney on the 31st of May, 1845. The sureties justified on the 7th of June last, and the property described in the writ was delivered to the plaintiff; that the defendant Weed was, on or about that time, in the city of New-York, publicly, at the store 191 Pearl-street; defendants' attorney so informed plaintiff, and requested him to have the process served, if he intended to do so; he informed plaintiff of the hours of the day on which Weed could be found at the store; Weed was a resident of Newburgh, and he remained in the city of New-York for a number of days, and had been frequently in the city after that time, and could have been served with process, had any effort been made for that purpose. That on or about the 2d day of September last, at the request of plaintiff's attorney, defendants' attorney gave a written consent to him, that he might discontinue all proceedings against the defendant Weed, and proceed against Roach, as though he only had been named in the writ, and waiving any irregularity in the proceedings. That no movement was made in the cause by plaintiff, until after the rule for *non-pros* was entered. Defendants' attorney alleged that the delay on the part of the plaintiff was designed, for the purpose of retaining possession of the property, and preventing the collection of the rent due.

C. STEVENS, *plaintiff's counsel.*

L. S. THOMAS, *plaintiff's attorney.*

N. HILL, JR., *defendants' counsel.*

H. A. WEED, *defendants' attorney.*

[\*194] \*Plaintiff's counsel insisted, that if the cause of action was specified in the writ, plaintiff must declare

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Frost agt. Whitcomb.

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against all the defendants. (3 *J. R.*, 539, *per cur.*) This was an action in which the true cause of action was expressed in the writ, and was bailable. If the property had not been found, the defendant would have been held to bail by statute; in that case clearly one defendant could not *non-pros* the plaintiff, and it could make no difference in the character of the action, that the property had been found.

Defendants' counsel insisted that the fact, that *all* the defendants were not brought in was no excuse for Coit neglecting to declare. The rule contended for by the plaintiff applied only to cases where the *special bail* was required. Here, property was taken and no special bail required. (16 *John.* 44; *Graham's Pr.* 192, 2d ed.) The motion on the merits was fully answered by the opposing affidavits.

JEWETT Justice. Denied the motion with \$7 costs.

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WILLIAM FROST agt. MOSES WHITCOMB.

A defendant will be allowed to add to his pleas a notice of *offset and recoupment*, after issue joined, and the cause has been twice noticed for hearing, on payment of costs, subsequent to the issue of costs of opposing motion.

*June Term*, 1846.

MOTION by defendant for leave to add to his pleas a notice of offset and recoupment.

This was an action for work and labor, done on special contract (in writing), to build a steam engine. Issue was joined September 4th, 1845. The cause was referred, but no hearing. The contract provided that the engine should be ready by the 8th of October, 1844, and \$25 was to be paid by plaintiff, as liquidated damages for each and every day that the engine remained unfinished after that day. Defendant, in June, 1845, commenced a suit against the plaintiff, to recover damages under the contract; but, finding the plaintiff to be insolvent a few days previous to this motion, countermanded his suit, and asked now to give notice of recoupment. De

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Brown agt. Masten.

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fendant offered to pay costs of the motion, if the plaintiff would consent to receive such notice. Plaintiff stated that the cause had been twice noticed for hearing, before the order staying proceedings was served.

G. R. J. BOWDOIN, *defendant's counsel.*

M. G. HARRINGTON, *defendant's attorney.*

R. W. PECKHAM, *plaintiff's counsel.*

J. T. MILLS, *plaintiff's attorney.*

JEWETT, Justice. Granted the motion on payment of costs subsequent to joining issue, and \$7 costs of opposing motion.

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[\*195] \*HORACE BROWN agt. JOHN MASTEN.

An affidavit of merits, setting forth that the defendant had stated *this* case to his counsel, instead of saying *the* case; *held*, sufficient.

*June Term, 1846.*

MOTION by defendant to set aside inquest and subsequent proceedings, for irregularity.

An inquest by default was taken in this cause out of its regular order on the calendar, at the New-York circuit, on the 18th of March last, by which the plaintiff's damages were found at \$1179.36, and six cents costs. Defendant's attorney had regularly filed and served an affidavit of merits previous to the circuit. The ground upon which the inquest was taken, and the only ground as admitted by plaintiff's counsel, was that the affidavit of merits filed and served by defendant's attorney was insufficient, because it set forth that the defendant had stated *this* case to his counsel, instead of saying *the* case.

R. W. PECKHAM, *defendant's counsel.*

JAMES M. SMITH, *defendant's attorney*

N. HILL, JR., *plaintiff's counsel.*

CHAS. S. H. WILLIAMS, *plaintiff's attorney.*

Overseers of the Poor of Greenville agt. Bishop.

JEWETT, Justice. Granted the motion, with \$10 costs, on the ground that the affidavit of merits was sufficient.

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In the matter of complaint of the OVERSEERS OF THE POOR  
OF GREENVILLE agt. NOAH BISHOP.

In the matter of an application by the overseers of the poor for a *certiorari*, &c., the *individual names* of the overseers should be used in the title, and in the writ

*June Term, 1846.*

MOTION, on behalf of Noah Bishop, to supersede the writ of *certiorari* issued in this matter, with costs.

On the 29th of December last, Almerin Marks, Esq., a supreme court commissioner of Greene county, allowed a writ of *habeas corpus*, directed to Benton Hallock, a constable of Greenville, in the county of Greene, for the purpose of making enquiry into his authority to detain Noah Bishop in his custody. Hallock, on the same day, made return to the writ, alleging in substance that he was a constable of the county of Greene, had said Bishop in custody by virtue of a warrant issued by two justices of the peace of the county of Greene; a copy of which warrant was set forth in the return, dated December 18th, 1845; that the warrant was issued by the justices, according to the provisions of "title 3, chapter 20, part 1st, of the Revised Statutes;" and also, "an act to organize the State Lunatic Asylum, and more effectually to provide for the care, maintenance and recovery of the insane, passed April 7, 1842." After hearing the allegations of the respective parties, Marks, \*the commissioner, [\*196] made an order that Bishop be discharged from the custody of Hallock, the constable. The warrant, under which Hallock claimed to detain Bishop, commanded his (Bishop's) removal to the Lunatic Asylum, at Utica, as a lunatic, and was directed to the constables and *overseers of the poor* of the town of Greenville; but in no part of the proceedings before

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Derickson agt. McCardle.

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the commissioner did it appear that Bishop was in the custody of any other person than Hallock, the constable. The order was not made to discharge Bishop from the overseers, or of any other person than Hallock, the constable. On the 13th of February last, at the February special term of this court, an order was granted *ex parte* that a *certiorari* issue to Marks, the commissioner, to remove into this court all the proceedings had before him in this matter, by which Bishop was discharged from the custody of the overseers, &c. The rule was granted, and the *certiorari* issued in the name and title of "The overseers of the poor of the town of Greenville." The counsel for Bishop moved to supersede the writ of *certiorari*, on the grounds: 1st. That no such proceedings had ever been had, as were recited in the rule and the writ. 2d. That the overseers of the poor were not the proper persons to sue out the writ. 3d. *That the individual names of the overseers of the poor were not used either in the writ or the rule.* 4th. That the writ was not indorsed as required by law. 5th. That it was not a proper case for the allowance of a writ of *certiorari*.

R. W. PECKHAM, *for motion.*

L. TREMAIN, *attorney for Bishop.*

N. HILL, JR., *opposed.*

M. SANDFORD, *attorney for Overseers.*

JEWETT, Justice. Granted the motion, with \$10 costs, on the ground that the *individual names* of the overseers of the poor were not used in the rule or writ.

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SAMUEL DERICKSON and JAMES D. ACKERMAN agt. PHILIP  
MCCARDLE.

Where a motion was made by the defendant's attorney to set aside default judgment, &c., and it appeared that defendant's attorney had received information before the motion was made, that the defendant did not wish to defend the suit, or to have the motion made; and had executed a writing directed to defendant's attorney, to countermand the notice of motion, which writing (as

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Derickson agt. McCardle.

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appeared) was not served on defendant's attorney, and he did not know of it until the motion was made; the motion was denied, with costs, and defendant's attorney would have been ordered to pay the costs of opposing the motion, had the written notice been served upon him before making it.

*June Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings, \*for irregularity, with costs. [\*197]

It appears from defendant's papers, that this was an action of assumpsit, commenced by declaration against McCardle and one John Gatens, defendants. Plea, non-assumpsit and notice of set-off as to defendant Gatens. Issue joined 26th January, 1846. Venue laid in the city and county of New-York. Defendant McCardle resided at Jamaica, L. I. Defendant Gatens made an affidavit of merits, which was filed, and copy served with plea and notice. On or about the 19th February, 1846, defendant's attorney, at the request of plaintiffs' attorney, signed a consent that plaintiffs discontinue the suit as to defendant Gatens, and on the same day plaintiffs' attorney served upon defendant's attorney a notice that the suit had been discontinued as against the defendant Gatens. On the 20th May last, defendant's attorney learned, accidentally, that the plaintiffs' attorney had taken judgment by default against defendant McCardle in February last, and had assessed damages and taxed his costs, without giving any notice to defendant's attorney. Defendant's attorney served notice of retainer on plaintiffs' attorney for both defendants, McCardle and Gatens.

The papers on the part of the plaintiffs showed that McCardle had stated that he had no defence to the suit, and on the 29th of May last he signed a notice, directed to defendant's attorney, as follows (title of the cause): "Please countermand the notice to set aside judgment in the above cause." Plaintiffs' attorney saw S. C. Williams, Esq., the counsel for McCardle, a few days before the motion made, and he, Williams, informed plaintiffs' attorney that the motion would not be made, and requested plaintiffs' attorney to get a countermand from defendant's attorney of the notice of motion, which de-

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Paddock agt. Tuttle.

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defendant's attorney declined to give, stating, as a reason, that his costs had not been paid. It did not appear that the written notice by McCardle, of countermand, had ever been served on defendant's attorney, or that he knew of it until on the argument of the motion, although plaintiffs' attorney had previously stated in effect, to defendant's attorney, that McCardle did not wish the motion to be made, and if it was made plaintiffs' attorney would get McCardle's affidavit to that effect; but did not get it, for the reason (as stated by plaintiffs' attorney), that McCardle was absent until it was time to attend to the motion.

\_\_\_\_\_, *defendant's counsel.*

\_\_\_\_\_, *plaintiffs' counsel.*

JEWETT, Justice. Denied the motion with \$7 costs, on the ground that it appeared McCardle did not wish to [\*198] defend the suit, or to have the motion \*made, and defendant's attorney must have known it. If defendant's attorney had been served with the written notice of countermand, signed by McCardle, before making the motion, he should have ordered him (defendant's attorney) to pay the costs of the motion.

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HENRY PADDOCK agt. LORENZO O. TUTTLE.

Where a motion for irregularity is founded on a matter of fact, which is sworn to positively, and, in opposition to the motion, such matter of fact is positively denied by an equal amount of testimony, the motion will be denied with costs.

*June Term, 1846.*

MOTION by defendant to set aside service of amended declaration, and all subsequent proceedings, for irregularity.

The amended declaration, in this cause, was filed in the clerk's office, the 17th of April, 1846. J. L. Brown, attorney for defendant, swore that on the *sixteenth* day of April, 1846,



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Borst agt. Spelman.

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an amended declaration in this cause was served on him personally at his office.

O. B. Mason swore that, on the *seventeenth* day of April, 1846, he personally served upon J. L. Brown, defendant's attorney, an amended declaration in this cause, which he had received from plaintiff's attorney for that purpose.

Defendant moved on the ground that no amended declaration in this cause was on file on the *sixteenth* day of April, 1846, when a copy was served on him.

Mr. TAGGART, *defendant's counsel.*

J. L. BROWN, *defendant's attorney.*

A. TABER, *plaintiff's counsel.*

N. A. GRAVES, *plaintiff's attorney.*

JEWETT, Justice. Denied the motion 'with \$7 costs.

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JOHN B. BORST and wife agt. JESSE B. SPELMAN and ALEXANDER FRASER.

Where one of the counts in plaintiffs' declaration is substantially bad, and is virtually abandoned, and the evidence offered and received on the hearing is applicable only to the remaining counts, and the referees report in favor of the plaintiffs *generally*; judgment (on motion) will be arrested, unless plaintiff shall move and procure an order at special term to amend the report of the referees, so as to make it applicable to the counts under which the evidence is received.

Such order to amend may be granted on payment of costs of motion in arrest, and costs of opposing motion at special term.

*June Term, 1846.*

MOTION by plaintiffs to amend the report of referees, so as to make it applicable to the first and third counts exclusively of plaintiffs' declaration.

\*This cause was an action of assumpsit, and was [\*199] referred to three referees: the referees reported thereon *generally* in favor of the plaintiffs, for \$2251.79. There  
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Northrup agt. Wright

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were three counts in the plaintiffs' declaration; and on the ground that the second count was substantially bad, the defendants moved in arrest of judgment at the last May term of this court; and on the argument of that motion, the court ordered that the judgment be arrested, unless the plaintiff at this special term moved for and obtained an order amending the report, so as to make it applicable to the first and third counts; and this motion was founded on affidavits and the certificate of the referees, showing that all the evidence of the plaintiffs was applicable to the first and third counts. It appeared from defendants' papers that they never heard or understood, on the hearing of the cause, that the second count in plaintiffs' declaration was abandoned, but that the evidence offered and received upon the reference was under all the counts in the declaration.

A. TABER, *plaintiffs' counsel.*

JOHN B. STAPLES, *plaintiffs' attorney.*

W. BLISS, *defendants' counsel.*

H. W. BECKWITH, *defendants' attorney.*

JEWETT, Justice. Granted the motion on payment of costs of motion in arrest, and \$7 costs of opposing this motion.

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RODOLPHUS E. NORTHRUP agt. WILLIAM WRIGHT.

On a motion for judgment as in case of nonsuit after stipulation, and the plaintiff shows that he is under an order to file security for costs, which he has been delayed in procuring, in consequence of the absence of plaintiff from the state, but expects to perfect such security and bring the cause to trial at the next circuit, he will be allowed to stipulate anew to try at the next circuit, on payment of costs of the motion.

*June Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit after stipulation.

Venue in this cause laid in the city and county of New-

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In the matter of Belknap.

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York : issue joined September 23d, 1844. On the 24th of November, 1845, plaintiff's attorney gave to defendant's attorney a stipulation in writing, to bring the cause to trial at the first circuit after the month of December, 1845. The first circuit after December, 1845, commenced on the third Monday of March last : the plaintiff did not notice the cause for trial at that circuit, nor bring it to trial, and issues of a later date were tried in their regular order on the calendar. Another circuit court for the city and county of New-York commenced its session on the first Monday of May last ; and the plaintiff did not notice the cause for trial at that circuit, nor bring the cause to trial, and issues of a later date were tried in their regular order on the calendar. On the part of the plaintiff, it appeared \*from the affidavit of [\*200] plaintiff's agent, James Kinsey, that he had the principal charge of the suit. The plaintiff was a citizen of and resided in the state of Connecticut ; and in consequence of his absence from this state, he (the agent) had been much delayed in obtaining security for costs in the cause ; the cause having been stayed until security should be filed, and he had not yet completed such security, but would be able to, and have the cause brought to trial without delay at the next circuit.

G. R. J. BOWDOIN, *defendant's counsel.*

JONATHAN MILLER, *defendant's attorney.*

J. EDWARDS, *plaintiff's counsel.*

WILLIAM S. SEARS, *plaintiff's attorney.*

JEWETT, Justice. Granted the motion, unless plaintiff stipulated to bring the cause to trial at the next circuit, and paid \$10 costs of the motion.

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In the matter of the attachment against the estate of GILES N.  
BELKNAP, an absent or absconding debtor.

A motion by the debtor for a mandamus, to compel the trustees of the estate of an absent or absconding debtor to nominate and have referees appointed under

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In the matter of Belknap.

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the statute, will be denied with costs, where it appears that evidence had been gone into before the trustees; and afterwards, on request of the debtor, and on a written stipulation signed by the attorney for him, the hearing was adjourned: it is then too late to refer the matter.

If the application for reference had been made to the trustees before the proceedings had progressed thus far, the debtor would have had a right to a reference. (1 *Howard*, 80.)

*June Term, 1846.*

MOTION on behalf of Giles N. Belknap, the debtor, for a mandamus to compel the trustees of his estate to nominate and have appointed referees under the statute.

On the 6th of October, 1845, an attachment was issued by James R. Doolittle, Esq., a supreme court commissioner of Wyoming county, in favor of and upon the petition and affidavits of James Early and James Russell, Jr., creditors, against the estate of Giles N. Belknap, as an absconding or concealed debtor. The sheriff of Wyoming took personal property of Belknap, which was appraised at \$84.50. After the expiration of three months from the first publication of the notice, to wit, on the 29th of January last, the supreme court commissioner appointed three persons as trustees in the matter. The trustees met on the 10th of March, to hear proof concerning the alleged indebtedness to the creditors, when the respective parties appeared before the trustees by their attorneys and counsel; and witnesses on behalf of the creditors were then examined by the attorneys and counsel, and cross-examined

by the attorney and counsel for Belknap, and substantive matters of defence introduced \*on behalf of Belknap; and the hearing was adjourned, on the request of Belknap, to the 7th of April; and also, on his request and on a *written stipulation signed by the attorney for Belknap*, was further adjourned to the 9th of April, when the attorney and counsel for Belknap served a written notice on the trustees, and on the attorneys for the attaching creditors, to have the matter referred according to the statute; which application was resisted by the attorneys for the attaching creditors, on the ground that it was then too late to have a reference, the evidence having been gone into before the trus-

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Quidore agt. Van Clief.

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tees, and the matter twice adjourned on application of the debtor. The trustees refused to refer, and, on the 13th of April, closed the evidence and decided the case. The attorney and counsel for Belknap did not appear after the service of the notice to refer.

J. H. COLLIER, *counsel for Belknap.*

W. BROOKS, *attorney for Belknap.*

D. M'MARTIN, *counsel for attaching creditors.*

GATES & M'KAY, *attorneys for attaching creditors.*

JEWETT, Justice. Denied the motion, with \$7 costs, on the ground that the debtor having given a written stipulation to adjourn the hearing, and after evidence had been gone into before the trustees, it was then too late to refer the matter.

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RICHARD QUIDORE agt. GARRET VAN CLIEF.

An inquest taken at the New-York circuit on the "railroad calendar," so called, which is intended to contain causes that will not take over one hour to try, will be set aside, *costs to abide event*, where it is shown that the defence will take at least three hours on the trial; defendant's attorney having filed an affidavit of merits, and intending in good faith to try. (*See ante.*)

*June Term, 1846.*

MOTION by defendant to set aside inquest.

This was an action of trespass: venue laid in New-York. Issue was joined September 1st, 1845. The cause was noticed for trial at the last October, December, and March circuits respectively; and an inquest taken on the 8th of April last, in the March circuit. It appeared from defendant's papers that an affidavit of merits was filed previous to the circuit, and copy served on plaintiff's attorney. At the December circuit, plaintiff's and defendant's attorneys had a conversation, when the cause was called upon the "railroad calendar," respecting the length of time it would take to try it; and defendant's attorney stated that the defence would require the examination

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Quidore agt. Van Clief.

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of at least four witnesses, and would necessarily consume some three or four hours in the trial; and it was then agreed between the attorneys, that the cause could not be tried on that calendar, as it was only noticed for the trial of [\*202] \*short causes not taking over one hour in the trial; and under such understanding, the cause was called and passed at that circuit. At the March circuit the cause stood low on the calendar, and there was no probability of its being reached in its regular order during the circuit; and on Monday, the 6th of April, the circuit judge announced that, for the balance of the circuit, he would not try any cause which would occupy more than one hour. Defendant's attorney stated that he believed that the trial of the cause would occupy at least three hours; and, relying upon the understanding had with plaintiff's attorney at the December circuit, supposed the cause would not be tried at the March circuit, for the reason that it was not considered a short cause within the decision of the circuit judge. On the 8th of April the cause was called upon the "railroad calendar," and an inquest taken by plaintiff's attorney in the absence of defendant's attorney, no one appearing on the part of the defendant. On the part of plaintiff, it appeared from the affidavit of plaintiff's attorney that he never gave any consent, or entered into any arrangement with defendant's attorney, to pass the cause at the circuit at which the inquest was taken. Plaintiff required but one witness, who fully made out his case. Plaintiff's attorney never assented that this was a long cause; that he let the cause pass at the December circuit, on account of the absence of the defendant's witnesses, defendant's attorney stating that his witnesses resided at New-Utrecht, Long Island, and he could not get them ready. Plaintiff's attorney told defendant's attorney that he had only one witness to prove his case, and he should call the cause at the first opportunity thereafter. He offered defendant's attorney to reinstate the cause on payment of costs. Defendant's attorney refused to pay any more costs than what plaintiff had been put to in taking the inquest. Defendant's attorney offered to

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Chauncey agt. Baldwin.

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let the costs abide the event, which plaintiff's attorney refused.

J. EDWARDS, *defendant's counsel.*

W. S. SEARS, *defendant's attorney.*

W. J. HASKETT, *plaintiff's counsel and attorney.*

JEWETT, Justice. Granted the motion : costs to abide the event.

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\*WILLIAM CHAUNCEY agt. DANIEL A. BALDWIN [\*205]  
and CHARLES WADSWORTH.

Service of copy case, affidavit, and notice of motion to set aside a report of referee, is not a stay of proceedings *per se*, until the case is settled. An order staying proceedings should be served. (*See 2 Howard, 82.*)

Where judgment was entered by plaintiff after defendants had served copy case, affidavit, and notice of motion to set aside report of referee, without an order staying proceedings; *held*, that the judgment was regular, and on motion by defendants to set aside such judgment, it was allowed *on terms*, and the order of the circuit judge of the first circuit granted at his special term, setting aside the judgment *with costs to abide event*, vacated.

*Semble.* That it is necessary for the *appellant* to serve on the *appellee* only a notice of bringing an appeal from an order of a circuit judge. Although such preliminary objection was not decided in this and the following case of *Bigelow* agt. *Heaton*, yet from the fact that the appeal in each case was heard, and decided on the merits, without any other papers having been served in either than a *notice*, and after the question of such service had been raised on the argument, it would *seem* that such service was deemed sufficient.

*September Term, 1846.*

AN appeal by plaintiff from an order of the circuit judge of the first circuit, granted at special term.

At a special term held on the 27th of June, 1846, by and before Judge EDMONDS, circuit judge of the first circuit (*See Sessions Laws, 1841*), an order was granted, on motion of defendants, setting aside the judgment entered in this cause, costs to abide the event, on the following facts : this cause was, on the 7th of April last in April circuit, referred to Edward Sanford, Esq., as sole referee; the referee on the 3d

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Chauncey agt. Baldwin.

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day of June last reported in favor of the plaintiff; on [\*206] \*the same day plaintiff's attorney entered a rule for judgment final on the report. Defendants' attorney prepared a case within the time allowed by the rules of this court, upon which to move to set aside the report of the referee, which was verified by the usual affidavit. On the 13th of June, a copy of the case and affidavit, together with notice of motion for the last July term, was served on plaintiff's attorney. On the 16th of June, plaintiff's attorney entered judgment on the report, without any notice given to defendants' attorney, and defendants' papers being retained by him. Defendants swore to merits on the motion, and that it was made in good faith, and not for the purpose of delay. Defendants' papers did not show that there was any order staying proceedings served with the copy case, affidavit, and notice of motion to set aside the report.

Plaintiff's attorney served on defendants' attorney for this appeal a notice, of which the following is a copy: (title of the cause), "Please take notice that I hereby appeal from the decision of the circuit judge, on the motion to set aside the judgment for irregularity, made on the 27th June last in this cause, and that the bond required to be given on such appeal, duly approved according to law, has been filed in the office of the clerk of this court, at the City Hall in the city of New-York, dated 3d of July, 1846," and which was the only paper served on defendants' attorney for bringing the appeal before this court.

Defendants' counsel insisted, on the argument, that the affidavit on which the motion was made should also have been served.

H. HARRIS, *plaintiff's counsel.*

W. H. TAGGARD, *plaintiff's attorney.*

G. R. J. BOWDOIN, *defendants' counsel.*

G. W. PARSONS, *defendants' attorney.*

BRONSON, Chief Justice. These papers do not raise the question made by the counsel as to what papers should be



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Bigelow agt. Heaton.

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served on an appeal from the special term orders of the circuit judge of the first circuit. As there was no order to stay proceedings, the plaintiff was entirely regular in entering judgment, and the judgment should only have been set aside on terms. *Ordered*, that the said order of the circuit judge be vacated, and in case the defendants shall, within ten days, procure and serve an order staying proceedings until the case which they have made, for the purpose of setting aside the report of the referee, shall be argued and decided, then, on payment by the defendants of the costs of entering the judgment, and \$7 costs of opposing this motion, it is further *ordered*, that the judgment be vacated and set aside. The plaintiff is not at liberty to proceed upon the judgment, until the ten days herein mentioned shall have expired.

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JOHN L. BIGELOW agt. WILLIAM C. HEATON.\* [\*207]

A circuit judge cannot strike a cause from the calendar, and render judgment pursuant to the 51st rule of this court. (*See also rule 79.*) But a circuit judge has a right to revoke his own order staying proceedings. Where a circuit judge granted an order to defendant staying proceedings until a bill of exceptions was decided, and subsequently, on cause shown by plaintiff, revoked the order before the bill was served; *held*, that he had a right to revoke such order.

As to the question what papers ought to be served on bringing an appeal from an order of a circuit judge, see the proceeding case of *Chauncey agt. Baldwin and Wadsworth*.

*September Term, 1846.*

AN appeal by defendant from an order of the circuit judge of the first circuit, vacating an order staying proceedings made at chambers.

It appeared from plaintiff's papers before the circuit judge, that this was an action of replevin. Venue laid in the first circuit. The cause was tried on the 9th of October last, and a verdict rendered for plaintiff; bill of exceptions was served by defendant on the first of January last. On the 7th of Jan-

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Bigelow agt. Heaton.

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uary plaintiff served amendments. On the 29th of January the parties appeared before the circuit judge for the purpose of settling the bill. Plaintiff alleged that the bill of exceptions was settled or approved and ready for signature by the circuit judge, for more than three months previous to the 23d of May last. On the 23d of May plaintiff's attorney served a notice of argument of the bill of exceptions for the 1st Saturday of June, before the circuit judge, and had not then been served with a copy of the bill. Plaintiff's attorney stated that he was informed and believed that the bill had never been presented to the circuit judge for settlement. The order of the defendant for time to make a bill of exceptions was accompanied by an order staying proceedings, which was then in force. Plaintiff's attorney stated that the defendant was a person of little or no property, and the delay of the defendant would seriously endanger the probability of securing or collecting the judgment, unless he was allowed to enter up judgment for the plaintiff according to the verdict.

From the papers on the part of the defendant, it was stated by defendant that he was not in failing circumstances, and was in as good pecuniary circumstances as when the verdict was rendered, and the delay which would be occasioned by the argument of the cause before the circuit judge would not at all endanger the probability of securing the payment of all the costs that might be awarded to the plaintiff. The only claim of the plaintiff was on the flour in question, was about \$281, and the value of property taken by virtue of the writ of replevin was about \$477.

[\*208] \*Defendant's attorney stated that the property, consisting of seventy-five barrels of flour, had been replevied and delivered to the plaintiff; the value of which was proved on the trial, at \$477.75. The cause had been tried three times; on the first trial plaintiff was nonsuited, on the second a verdict was found for the defendant. On or about the last week of February last, defendant's attorney received the bill of exceptions and the amendments from the circuit judge, and began to prepare the bill for signature, according

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Bigelow agt. Heaton.

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to the amendments as settled by the circuit judge. On the 13th of March last he received a notice from plaintiff's attorney that plaintiff's attorney would present the amendments to the circuit judge on the 14th of March at 10 o'clock, A. M., for settlement and review. On the 14th of March defendant's attorney, by direction of the circuit judge, returned to the judge the bill and amendments as settled, and within a day or two thereafter was informed by the judge that he would write out his charge, to be inserted in the bill. On the 1st day of June last defendant's attorney received from the circuit judge the bill of exceptions and amendments, with the judge's charge as written out. Defendant's attorney was not aware that the bill and amendments were ready for delivery, until the 30th of May last; previous to the 1st day of June defendant's attorney had the bill of exceptions prepared for signature, with the exception of the judge's charge, and also of the incorporation of one or two items of documentary evidence, which were introduced on the last trial as evidence by the plaintiff; the bill of lading of the flour in question was offered in evidence on the last trial on the part of the plaintiff, and was required to be inserted in the bill; this bill of lading remained in the hands of the plaintiff's attorney. After the order, to show cause why the order staying proceedings should not be vacated, was served on defendant's attorney, he had sent a written request to plaintiff's attorney to furnish defendant's attorney with the papers offered in evidence by the plaintiff, and required to be inserted in the bill of exceptions, but plaintiff's attorney had not served them, and defendant's attorney could not finish the bill without such papers.

Defendant's attorney, in an affidavit made for the motion on the appeal, stated that, in consequence of the order vacating the order staying proceedings, judgment had been entered in the cause. The bill of exceptions with the amendments were then (4th September) in possession of the circuit judge, and had been in his possession since the 4th or 5th of June last; and the engrossed bill ready for signature was left with the judge at that \*time. Defendant's attorney [\*209]

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Peck agt. Wood.

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had frequently, since judgment was entered, requested the bill to be delivered to him, to enable him to proceed with the cause, but had not been able to procure them.

G. R. J. BOWDOIN, *defendant's counsel.*

GEO. W. NILES, *defendant's attorney.*

R. L. JOICE, *plaintiff's counsel.*

O. H. PLATT, *plaintiff's attorney.*

Defendant's counsel insisted that after a circuit judge had granted a stay of proceedings on a bill of exceptions, until the same was argued, and decided, he had not the power to revoke that order, because the bill of exceptions had not been served after it was settled. The application should have been made at a special term, in analogy with the practice when the cause is on the general calendar. The same question raised in this case as in the next preceding, as to the service of papers on bringing an appeal from an order of a circuit judge. No papers, except the notice of appeal, were served in this case.

BRONSON, Chief Justice. Although the circuit judge cannot strike a cause from the calendar, and render judgment pursuant to the 51st rule of the court (see also rule 79), still he clearly has a right to revoke his own order to stay proceedings; and that is all that was done in this case. For what reason the order was revoked does not appear, and the bill of exceptions is not before us. We cannot see, therefore, that any wrong has been done. Motion denied, with \$7 costs. It is, of course, unnecessary to notice the preliminary objection, that no papers were served.

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JOHN M. PECK agt. JOHN WOOD.

TAXATION OF COSTS.

*September Term, 1846.*

MOTION by defendant for retaxation of costs.

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From defendant's papers, it appeared, that this was an action of assumpsit, referred, at the Rensselaer circuit in 1845, to David Buel, Jr., Esq., sole referee, and brought to a hearing at the city of Troy, on the 9th September, 1845. On the 31st January, 1846, the referee reported in favor of the plaintiff \$73.87. Judgment had been perfected and a *feri facias* issued to the sheriff of Oswego on the 22d April last. A copy bill of costs, with notice of retaxation for the 23d day of June last, before A. B. Olin, Esq., recorder of the city of Troy, was received by defendant's attorneys, on the 18th June last. Olin, the recorder, being absent on the 23d June, the bill of costs was retaxed by J. Romeyn, Esq., judge, &c. Defendant's counsel, \*who opposed the taxation (John [\*210] Raymond, Esq.), objected before the taxing officer to the following items, to wit: "Counsel perusing and amending narr, \$2." "Notice to plead and service of do., \$0.75." "Notice of order for bill of particulars to show cause and proof of service, \$0.75." "Attendance before judge to procure same, \$1." "Attendance before judge on return of order, \$1." "Attendance before judge to procure absolute order for bill of particulars, \$1." "Proof of service of notice of inquest for judge, defendant and clerk, \$1." "Notice of motion to refer and proof of service, \$0.75." "Attorney and counsel fee on motion, \$3." "Drawing bill of particulars and two copies, \$2." "Notice of same to defendant's attorneys and proof of service, \$0.75." "Proof of service of notice for referee and for defendant's attorneys, \$1." "Draft of subpoena for reference and two copies, \$1.50." "Drawing brief for hearing, \$3." "Counsel perusing and amending judgment record, \$2." "Serving bill of costs with notice of taxation, \$0.50." "Proof of service of do., \$0.50." "Attorney and counsel fee opposing defendant's motion to change venue, \$6." "Drawing bill of costs for retaxation and copy, \$1.50." "Copy costs and notice of retaxing, \$0.75." "Proof of service of do., \$0.50." "Serving bill of costs with notice of retaxation, \$0.50." "Proof of disbursements and attendance of witnesses on retaxation, \$1." "Witnesses' fees, as per

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affidavit, attending 26 days, \$13." "Travel of witnesses, as per do., \$50.32." The objections made to the several above mentioned items were overruled, and the items allowed by the taxing officer, except the following, which were stricken out by him, to wit: "Attendance before judge to procure order for bill of particulars or show cause, \$1." "Attendance before judge to procure an absolute order for bill of particulars, \$1." "Drawing bill of particulars and two copies, \$2." "Drawing brief for hearing, \$3." "Counsel perusing and amending judgment record, \$2." The affidavit of the plaintiff was read before the taxing officer, in support of the charges for witnesses' fees, travel attendance and subpoenaing witnesses on behalf of the plaintiff, which affidavit read as follows: (Title, &c.) "John M. Peck, the plaintiff in the above cause, being duly sworn, upon his oath, says, that at the Rensselaer circuit, in 1845, this cause was referred to David Buel, Jr., sole referee, and the same was brought to a hearing before the said referee on the ninth day of September, 1845. And this deponent further says, that each of the following named persons was duly subpoenaed to attend said hearing as witnesses on the part and behalf of this deponent, and that each said persons attended said hearing the [\*211] \*number of days, reside at the place and necessarily traveled the number of miles set opposite their respective names to reach the city of Troy where said reference was held. Hiram Ferguson, 3 days, Sandy Creek, 156 miles; Jabez H. Gilbert, 1 day, Pulaski, 150 miles; John Wood, Jr., 3 days, Pulaski, 150 miles; Ezekiel Rand, 3 days, city of Troy; Stephen Rand, 3 days, do.; David Philips, 2 days, Grafton, 17 miles; John W. Bates, 2 days, city of Troy; Russell Sage, 1 day, do.; Sophia Pierson, 1 day, do.; David Peck, 1 day, do.; Charles Tuba, 1 day, do.; Mr. Moon, two days, do. And this deponent further says that Mrs. Ferguson, the wife of the witness Hiram Ferguson, above named, was duly subpoenaed, as this deponent believes, as a witness for this deponent; that she was in the city of Troy during the three days that the said hearing was going on, and ready to

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be called on whenever she should be wanted as a witness, but was actually present at the hearing but one day, and that the last named witness resides at Sandy Creek, in the county of Oswego, distant from the city of Troy 156 miles. And this deponent further says, that all the above named witnesses were necessary and material for him on the hearing of said cause, as he was advised by his counsel and verily believes, and further deponent saith not." (Signed, &c.) Jabez H. Gilbert's affidavit was produced on the part of the defendant before the taxing officer, which stated in substance, that he was sworn on the hearing of the cause, as a witness; he resided at Richland, Oswego county, about 160 miles from Troy, he was not subpoenaed in the county of Oswego, but at the city of Troy, on the 11th September, 1845; he did not travel from his residence to the city of Troy for the purpose of attending the hearing as a witness, or for any other purpose than his own private business, and was in the city of Troy on his own business at the time of the hearing, and was then subpoenaed by the plaintiff; he was not paid at any time any travel fees as a witness, nor was there any ever offered to him, he believed he was paid for one or two days' attendance. John Wood, Jr.'s, affidavit was not produced before the taxing officer, but was read as explanatory on the motion for re-taxation, by defendant's counsel, which stated in substance, that he attended the hearing of the cause as a witness for the defendant, resided in Richland; he was never subpoenaed by plaintiff or on his behalf, as a witness, he did not travel or attend as a witness for plaintiff, but for defendant; he was never paid any travel fees, or fees for attendance by plaintiff, nor was any such fees ever offered to him; he was never requested by any person to attend as a witness for plaintiff; he was never promised any fees for travel or attendance as witness for plaintiff. John \*Raymond, Esq., the [\*212] counsel who opposed the taxation, stated in his affidavit that he objected to all the items, first above enumerated, and presented to the taxing officer the affidavit of Jabez H. Gilbert, on the re-taxation, and objected to the traveling

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fees charged for him as a witness, also objected to other witnesses' fees charged in the bill.

On the part of the plaintiff, it appeared from the affidavit of the plaintiff, that some time in the summer of 1845, and one or two months before the hearing, Jabez H. Gilbert was at the city of Troy, at the residence of plaintiff, on business, plaintiff had been long acquainted with him, and they had been on intimate terms for some ten years previous; plaintiff spoke to him in relation to this suit, and stated to him, that when the hearing took place, plaintiff should want him as a witness, and asked him if he would not attend without obliging plaintiff to go or send to Oswego county for him. Gilbert informed him he would, if plaintiff would give him a short notice of the time when the hearing took place; soon after the cause was noticed, plaintiff sent word to Gilbert by Hiram Ferguson, who resided near him, of the time and place of hearing, and desired his attendance as a witness. Plaintiff was informed that Gilbert received such notice; when Gilbert arrived at Troy, a day or two after the hearing had commenced, plaintiff served him with a subpoena, but did not pay him any fees at the time, because Gilbert said he did not want plaintiff to do so; plaintiff and Gilbert had a running account with each other, and plaintiff expected that when they had a settlement, his account for attending as a witness would be presented and paid by plaintiff; Gilbert's evidence given on the hearing was material for plaintiff. At about the time the cause was noticed for hearing, plaintiff's counsel informed plaintiff that John Wood, Jr., would be a material witness for him, and a subpoena was made out for him; shortly afterwards plaintiff learned that the witness would be present on the hearing, and he delayed sending the subpoena for him. On the morning of the 9th September, before the hearing commenced, plaintiff served the subpoena on Wood, Jr., at Troy, and gave him fifty cents, which Wood accepted as sufficient; a material fact which was expected to be proved by plaintiff, by the witness Wood, was proved by another witness, and Wood was not called by plaintiff as a witness.



Job Pierson, one of the attorneys and counsel for plaintiff, stated in his affidavit that the declaration was special. An order was obtained for defendant's attorneys to deliver a bill of particulars, proof of service of such order was made before the officer and absolute order obtained and served with notice thereof.

\*Defendant's attorney served papers for motion to [\*213] change venue, which was opposed by plaintiff's counsel and the motion denied. The cause was noticed for trial at the Rensselaer circuit in April, 1845, and plaintiff's counsel made an affidavit for a reference, which was not served, by reason of the agreement made between plaintiff's and defendant's counsel to refer the cause to a sole referee. Levi Smith, a clerk of plaintiff's attorney, in his affidavit, stated, that on the retaxation, the items of attorney's fees, and which were objected to by defendant's counsel, amounted to \$32; the bill presented for retaxation by plaintiff's attorney, one-third of the \$32 had been deducted; and that of the items objected to only \$2.34 had been presented for taxation. The taxing officer deducted, from the items objected to, \$9.50, but the officer should not have deducted of the items he intended to deduct only two-thirds thereof, as one-third had been deducted by plaintiff's attorney. The taxing officer deducted by inadvertence \$3.16 more than he intended. After the bill of costs was first taxed, which was on the 13th of March last, and before it was retaxed, disbursements for postage had accrued, which were not contained in the original bill, and the bill retaxed varied in that and other respects from the first bill, and proof of such disbursements, and proof of the attendance of witnesses were made on the retaxation of the bill. A certificate of counsel was produced before the taxing officer, that the declaration was special. The only objection made by defendant's counsel to the charge of witnesses' fees, or the travel fees, was that of the travel of the witness, Jabez H. Gilbert, and the attendance of the witness Mrs. Ferguson, one or two days.

A. Z. McCARTY, *defendant's counsel.*

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McCARTY & WATSON, *defendant's attorneys.*JOB PIERSON, *plaintiff's counsel.*S. D. PIERSON, *plaintiff's attorney.*

BRONSON, Chief Justice, struck out,	
Proof of service of rule to plead, - - - -	\$0 50
do do final order for bill of particulars, - -	50
Notice of motion to refer at circuit, and proof of service (not done), - - - -	75
Attorney and counsel fee on motion to refer at circuit, not chargeable (5 <i>Hill</i> , 556), - - - -	3 00
Proof of service of bill of particulars, - - - -	50
do do notice of hearing for referee and party 4s and 4s, - - - -	1 00
Two copies subpoena, - - - -	50
Proof of service of costs for taxation, - - - -	50
Copy costs, charged before, or twice, - - - -	50
[*214] *Proof of service of do, - - - -	50
Travel fee of Gilbert (6 <i>Wend.</i> 548), - - - -	12 00
	<hr/>
	\$20 25
Deduct for mistake of taxing officer against the plain- tiff, - - - -	3 16
	<hr/>
	\$17 09

The affidavit as to the other witnesses was insufficient, but the question was not raised before the taxing officer, which the defendant makes here.

*Ordered*, That \$17.09 be deducted from the bill of costs as taxed on the 13th of June last, and be allowed to the defendant on the judgment and execution.

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JOHN TAYLOR *et al.* agt. PHILEMON H. FROST and JAMES S. DICKERSON.

A new trial may be granted on the ground of *surprise*, where the plaintiff is not suited, not upon the principal question involved in the controversy, but for the failure to establish a subordinate fact, about the existence of which there is no

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doubt; the plaintiff having exercised due diligence in preparing the cause for trial, and had reason to believe that the evidence which he could produce would fully establish such subordinate fact, but which unexpectedly failed him on the trial.

Although new trials are not often granted upon the ground of *surprise*, yet there may be cases which call for relief in that form.

Such motions are proper to be heard at special terms.

*September Term, 1846.*

MOTION by plaintiffs for a new trial, on the ground of surprise.

This suit was instituted for the recovery of the damages to the plaintiffs, by reason of an attachment as against non-resident debtors, claimed by them to have been issued illegally by the defendants Frost and Dickerson, and levied upon plaintiffs' goods; subsequently, Grosvenor & Starr (who were also originally sued with Frost & Dickerson), filed a claim under the attachment. The declaration contained three counts. 1st. Trespass on the case, that plaintiffs were entitled to possession of divers goods and chattels of great value, to wit: \$20,000; which goods and chattels in the warehouse of Russell & Hawes in the city of Buffalo, Erie county, said defendants, to wit: on March 1st, 1841, wrongfully and unjustly seized and converted, and absolutely disposed of, to their own use. 2d. Trespass on the case, same as first count in all particulars, except alleged plaintiffs were "owners and proprietors" of the goods and chattels. 3d. Trover, that plaintiffs possessed, as of their own property, certain goods and chattels, to wit (specifying them): of the value of \$20,000; on March 1st, 1841, casually \*lost the same, and the [\*215] same came into defendants' hands and possession by finding. Yet, &c. hath not (&c.) delivered the same; but afterwards, to wit: on March 1st, 1841, converted same to their own use, &c. Defendants Frost and Dickerson pleaded general issue, and *nolle prosequi* was entered against defendants Grosvenor & Starr. The trial of the issue thus joined was had on the 18th and 19th days of June, 1846, at the Erie circuit, before Hon. N. DAYTON, circuit judge. The plaintiff appeared by Le Grand and George L. Marvin, their counsel;

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and defendants Frost and Dickerson appeared by George P. Barker and Seth E. Sill, their counsel, on which trial was had, and testified as follows: *Dyer Tillinghast* testified he was supreme court commissioner during A. D., 1838, in the city of Buffalo: he knew not, personally, either party to this suit. (A petition and four affidavits were shown witness, in the words and figures as follows:)

"Messrs. Taylor, Moore & McGriff,

"To Frost & Dickerson, Dr.

"To amount of note dated August 13th, at eight  
months, due 13th and 16th April, 1838, . . . \$540.50

"City and county of New-York, ss.: David Stoutenburgh, of the said city and county, being duly affirmed, doth depose and say, that Messrs. Taylor, Moore & McGriff, of the state of Indiana, are indebted to Messrs. Frost & Dickerson, of the city of New-York, for goods sold to the amount of five hundred and forty dollars and fifty cents, as charged in the above bill; for which the said Frost & Dickerson hold the promissory note of the said Taylor, Moore & McGriff, dated and payable as mentioned in said bill. That said note is at present not in their immediate possession, having been sent to Mr. W. H. Lowerre, of Pittsburgh, for the purposes of collection, as this deponent believes. That the deponent has been, from the giving of said note to the present time, the clerk and bookkeeper of the said Frost & Dickerson; and that no part of said note has ever been paid, to his knowledge or belief.

(Signed), "D. STOUTENBURGH.

"Affirmed before me this 24th of August, 1838,

"H. HUTCHINSON, *Com'r of Deeds.*"

"City and county of New-York, ss.: David Stoutenburgh, of the said city and county, being duly affirmed, doth depose and say that the persons composing the mercantile firm of Taylor, Moore & McGriff, in relation to whose account with Messrs. Frost & Dickerson this deponent lately made an affidavit before H. Hutchinson, commissioner of deeds, are un-

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derstood \*and reputed to be residents of the state of [\*216] Indiana, and not of the state of New-York; and the deponent doth verily believe them to be residents of the state of Indiana, and not of the state of New-York.

"D. STOUTENBURGH.

" Affirmed before me this 30th of August, 1838,

" H. HUTCHINSON, *Com'r of Deeds.*"

" To Dyer Tillinghast, Esq., supreme court commissioner. The petition of Philemon H. Frost and James S. Dickerson, of the city of New-York, respectfully sheweth that your petitioners are creditors of Taylor, Moore & McGriff, and jointly as copartners under said name and style, and have a demand against them all personally, arising upon contract within this state, amounting to one hundred dollars and upwards; and that the said Taylor, Moore & McGriff, whose given names your petitioners do not know, except that said Taylor's name is John Taylor, are indebted to your petitioners in the sum of five hundred and fifty-four dollars and sixty-eight cents, over and above all discounts, as appears by the affidavit of your petitioners, hereto annexed; and that the said John Taylor, Moore & McGriff are not, nor are either of them, residents of this state, but reside at Lafayette, in the state of Indiana, or elsewhere out of the state of New-York, as will also appear by the affidavit of David Stoutenburgh, and hereunto annexed. Your petitioners, therefore, pray that your Honor will, in pursuance of the statute in such case made and provided, issue your warrant to the sheriff of the county of Erie, thereby commanding him to attach and safely keep all the estate, real and personal, of the said Taylor, Moore & McGriff, within his county, except such articles as are by law exempt from execution, with all books of accounts, vouchers and papers relating thereto. Petitioner further says their copartnership name and style is Frost & Dickerson. And your petitioner will ever pray, &c.

" FROST & DICKERSON,

" By S. G. HAVEN, their attorney."

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"State of New-York, county of Erie, ss.: Solomon G. Haven, being duly sworn, doth depose and say that he is the attorney of Frost & Dickerson, the petitioners above named; that said Frost and Dickerson have a demand against Taylor, Moore & McGriff, personally arising on contract within this state, amounting to one hundred dollars and upwards; and that the said Taylor, Moore & McGriff are indebted to said Frost & Dickerson in the sum of five hundred and fifty-four dollars and sixty-eight cents, over and above all discounts.

And this deponent further says that the said [\*217] \*Taylor, Moore & McGriff are not, nor are either of them residents of this state, but reside at Lafayette, or elsewhere out of the state of New-York, as deponent has been informed and verily believes to be true.

"S. G. HAVEN.

"Subscribed and sworn before me this 3d day of September, 1838.

"N. K. HALL, *Com'r of Deeds of Erie county.*"

"State of New-York, county of Erie, ss.: Alexander Mackenzie Ross, of Buffalo, being duly sworn, doth depose and say, that Taylor, Moore & McGriff, the debtors in the annexed petition of Frost & Dickerson named, reside at Lafayette, in Indiana, or elsewhere out of the state of New-York, as this deponent is informed and verily believes to be true.

"A. MACKENZIE ROSS.

"Subscribed and sworn before me this 3d day of September, 1838,

"N. K. HALL, *Com'r of Deeds for Erie county.*"

These affidavits and petition were presented to me, as such commissioner, on September 3d, 1838, and on them the same day I issued a warrant, also an order of publication, in the words and figures as follows :

"By order of Dyer Tillinghast, Esq., supreme court commissioner, &c. ; to the sheriff of the county of Erie, greeting : whereas Philemon H. Frost and James S. Dickerson have this

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day made application, in writing, to me for an attachment against John Taylor, Moore & McGriff, the first names of said Moore & McGriff not being known to said applicants; which said Taylor, Moore & McGriff are non-resident debtors, praying for such attachment, and setting forth that the said Frost & Dickerson are creditors of the said Taylor, Moore & McGriff, and have a demand against the said Taylor, Moore & McGriff, personally arising on contract within this state, amounting to one hundred dollars and upwards, and that the said Taylor, Moore & McGriff are justly indebted to the said Frost & Dickerson in the sum of five hundred and fifty-four dollars and sixty-eight cents, over and above all discounts, and that the said Taylor, Moore & McGriff are non-residents of this state, but reside at Lafayette, in the state of Indiana, or elsewhere out of the state of New-York; which said application is verified by the affidavits of the said Frost & Dickerson's attorney, Solomon G. Haven, and the facts and circumstances to establish the grounds on which the said application is made being also verified by the affidavits of David Stoutenburgh and two disinterested witnesses, and such proof being made to my satisfaction, I do therefore, by virtue of the power and the authority to me given in and by the statute concerning \*'attachments against absconding, concealed, and [\*218] non-resident debtors,' command you the said sheriff to attach and safely keep all the estate, real and personal, of the said Taylor, Moore & McGriff, within your county (except such articles as are by law exempt from execution), with all books of account, vouchers, and papers relating thereto. And further, that you immediately, on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken in your custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory, after being signed by you the said sheriff, and the said appraisers, shall, within ten days after such seizure, be by you returned to me at my office in Buffalo, in the said county,

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and hereof fail not. Given under my hand and seal at Buffalo, this third day of September, 1838.

"D. TILLINGHAST,  
"Supreme Court Commissioner." [L. S.]

"Let notice be published in the state paper, and in the newspaper printed in the city of New-York, to wit: in the paper called the New-York American, and in a newspaper printed in the county of Erie, once in each week for nine months, that an attachment has issued against the estate of Taylor, Moore & McGriff, non-resident debtors, on due proof made to me pursuant to the directions of the statute concerning 'attachment against absconding, concealed, and non-resident debtors,' and that the same will be sold for the payment of their debts, unless they appear and discharge such attachment according to law, within nine months from the first publication of the said notice, and that the payment of any debts due to them by residents of this state, and the delivery to them, or for the use of any property within this state belonging to them, and the transfer of any such property to them, as forbidden by law and are void. Given under my hand at Buffalo, this 3d day of September, 1838.

"D. TILLINGHAST,  
"Supreme Court Commissioner."

The handwriting of the two affidavits of Stoutenburgh I do not know; the handwriting in the petition and affidavit signed by Haven, and in the body of the affidavit of Ross, and of the above warrant and order, are the handwriting of Solomon G. Haven; I think I delivered the warrant to Haven, but do not distinctly recollect. The return of the sheriff to that warrant, and the inventory and appraisal therewith in the words and figures as follows:

"State of New-York, Erie county. The following [\*219] is an inventory of \*all the property seized and taken into custody of the undersigned sheriff of said county, by virtue of a warrant or attachment, a copy of which



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this paper and said inventory is annexed, it was immediately after the said seizure by the undersigned sheriff, with the assistance of the undersigned John W. Stewart and Stephen V. R. Graves, two disinterested freeholders.

" 5 boxes of shoes,	.	.	.	.	\$125 00
2 half chests of tea,	.	.	.	.	48 00
1 case of goods,	.	.	.	.	25 00
3 trunks of goods,	.	.	.	.	150 00
1 dry keg,	.	.	.	.	8 00
12 bags of coffee,	.	.	.	.	220 00
1 bag of specie,	.	.	.	.	7 00
2 boxes of goods,	.	.	.	.	600 00
1 box of starch,	.	.	.	.	8 00
					<hr/>
					\$1181 00

" All of which we appraise and value at the sum of eleven hundred and eighty-one dollars.

"CHARLES PERSONS, *Sheriff*,

" By L. BROWN, *Under Sheriff*.

"J. W. STEWART, }  
 "S. V. R. GRAVES, } *Appraisers.*

" Filed Oct. 6th, 1838."

was the return of the sheriff, and by the under sheriff therein named, and filed by me October 6th, 1838. The petition and affidavit in the words and figures as follows:

" In the matter of Taylor, Moore } Petition to be deemed  
 & McGriff, non-resident debtors. } an attaching creditor.

City and county of New-York, ss. Seth Grosvenor, of the said city, and one of the firm of Seth Grosvenor & Co. of said city, being duly sworn, says, that Taylor, Moore & McGriff, above named, who are residents of the state of Indiana, are justly indebted unto him, the said Seth Grosvenor, and Henry B. Starr, partners of the firm of Seth Grosvenor & Co., in the sum of six hundred and fifty-five dollars and eight cents, over, and due on the 18th day of August last past, all discounts;

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which sum is now due, and arose upon a contract made in the said city and state of New-York.

"S. GROSVENOR.

"Subscribed and sworn this 21st day of September, 1838, before me,

"WM. H. MAXWELL, *Commissioner of Deeds.*"

"To Dyer Tillinghast, Esq., supreme court commissioner in the county of Erie, and state of New-York. The [\*220] petition of Seth Grosvenor and \*Henry B. Starr, merchants of the city of New-York, humbly sheweth, that whereas a warrant of attachment has lately been issued by you against the real and personal property of Taylor, Moore & McGriff, of the state of Indiana, non-resident debtors; and whereas the said debtors are justly indebted unto your petitioners in the sum of money specified in the affidavit hereunto annexed. Your petitioners, therefore, pray that they may be deemed attaching creditors. Dated 21st day of September, 1838.

"S. GROSVENOR.

"HENRY B. STARR.

"S. G. HAVEN, *Attorney.*"

were presented to and filed by me, September 25th, 1838. No other proceedings, in said attachment against John Taylor, Moore & McGriff, were ever had before me. No trustees were ever appointed by me. No report of any kind was ever made in said attachment. I was such commissioner till in May, 1840.

*Lorenzo Brown* testified: I was under sheriff of Charles P. Persons, sheriff of Erie county, during 1838; do not know either of the parties to this suit; the above warrant of attachment I received September 3d, 1838, and made return with the inventory; I found the goods mentioned in the inventory in Russell and Hawes' warehouse on Buffalo Creek, in Buffalo city; I do not recollect from whom I received the warrant; it was handed to me as an officer to execute; I attached goods as the goods of Taylor, Moore & McGriff; Stewart and Graves,

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then deputy sheriffs of the said sheriff, were the appraisers, and they subscribed the inventory; no one, to my knowledge, called upon me to settle that attachment.

*Cross-examined.* I cannot tell who gave me the warrant; I think some one handed it to me; I never knew an attachment left without directions where to find the goods.

*John W. Stewart* testified: During 1838 I was deputy sheriff of Charles P. Persons, then sheriff of Erie county; I recollect of goods being seized on attachment, as against non-resident debtors, that year, in Russell & Hawes' warehouse, by then under sheriff Brown; also by me, at same time and place, on other attachments. My name on the above inventory and appraisal is my signature; I think we did not open the boxes; I had, at same time, an attachment against one Winton; the two attachments I had were paid; I received the pay from Russell & Hawes; Frederick G. Stanley, an attorney, then of Buffalo, now dead, had charge of these two attachments; I do not recollect the marks on the boxes, &c., above mentioned.

*James A. Sherwood* testified: I had a subpoena against David A. Eddy \*to serve on him—did not [\*221] find him. I ascertained he was in the state of Ohio.

*Cross-examined.* I am not a clerk in Mr. Marvin's office; do writing there occasionally. To serve subpoena I went not out of this city, only to Mr. Hawes's; I went on Saturday, and again on Monday last to Mr. Hawes's store, also to Mr. Stewart's.

*Samuel Hawes* testified: During 1838 I was one of the firm of Russell & Hawes, engaged in transportation on the Erie canal. I do not recollect of any goods being attached in fore part of September, 1838, at our warehouse. Mr. Russell attended to our transportation business; Mr. Russell died a year or two ago; David A. Eddy was in 1838 one of our clerks; he is in Ohio I suppose; about a week since I received a letter from him, in his handwriting, postmarked in Ohio; he was engaged in business with me, and slept in my store when home.

*Cross-examined.* I last saw Eddy at my store in Main

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street in this city, know his handwriting, and believe the letter, dated and postmarked in Ohio, his handwriting. His business in the summer for several years has been in Ohio.

*Seth Grosvenor* testified: I reside in New-York city; am acquainted with defendants; the firm of Frost & Dickerson in the city of New-York consisted of Philemon H. Frost & Dickerson, I do not recollect Dickerson's given name.

*Cross-examined.* I was originally one of the defendants in this cause. There was not a dollar of indebtedness of the plaintiffs to me, or my partner Starr, at the time of entering the *nolle prosequi* in this suit. It was a condition of our settling with the plaintiffs, that the suit should be discharged.

*Re-direct.* I had no personal communication with plaintiffs or either of them, oral or written, since this suit was instituted. Just before the entering of the *nolle prosequi*, myself and partner signed an agreement we would not plead the statute of limitations in any future suit against us for the same cause of action, if commenced within some specified time.

*Re-cross-examined.* In settling our claim against plaintiffs, I communicated only with my attorney; I received securities for our claim on plaintiffs; I wrote a second time to my attorney to take the securities of the plaintiffs, whether they discontinued this suit or not, and before the claim was settled, and do not know in fact the condition of the settlement.

*Thomas M. Foote* testified: During 1838 I was [\*222] one of the publishers \*of the Commercial Advertiser, a daily newspaper then published in the city of Buffalo. In our Commercial Advertiser of September 3, 1838, was that day published and circulated a notice of attachment, in words and figures as follows:

“By order of Dyer Tillinghast, Esq., supreme court commissioner for Erie county. Notice is hereby given, pursuant to the provisions of the statute authorizing attachments against absconding, concealed, or non-residing debtors, that an attachment has issued against the estate of Taylor, Moore & McGriff, who are not inhabitants of this state, but are non

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resident debtors, residing in the state of Indiana, and that the same will be sold for the payment of their debts, unless they appear and discharge such attachment according to law, within nine months from the first publication of this notice; and that the payment of any debts, and the delivery of any property belonging to such debtors to them or to their use, and the transfer of any property by them for any purpose, whatever, are forbidden by law and are void. Dated the 3d day of September, 1838.

"S. G. HAVEN,

*"Attorney for Attaching Creditors."*

Our newspaper was then taken by Russell & Hawes, I think.

*Nathan K. Hall* testified: During 1838 was an attorney and counselor in this court, of the firm of Fillmore, Hall & Haven; Fillmore was absent in September, 1838; Haven did the general correspondence, attended generally to the law business, and I to the chancery business; I do not recollect to have written defendants; I may have written to Grosvenor & Starr touching their claim. Their petition and affidavits in the attachment are in my handwriting; the defendants' papers on the attachment I have no recollection to have seen—I must have signed my name and taken the oaths to the same as commissioner of deeds; I was commissioner of deeds for Erie county that year.

*Jason Sexton* testified: During 1838 I was in the grocery business, and was acquainted with weights of bags of coffee that year. There are various classes as to size of bags of coffee; the larger class never varies more than from 150 pounds to 165 pounds, usually about 160 pounds.

*Solomon G. Haven* testified: During 1838 I was an attorney and counselor in this court, of the firm of Fillmore, Hall & Haven. The writing in the filling up of the petition of defendants, and in the two affidavits signed by me and Ross, also in the filling up of the warrant of attachment, and in the order of publication, are in my handwriting, and the subscrip-

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tion of defendant's name by me as attorney to the [\*223] petition, and of my \*name to the affidavit by me, are in my handwriting. The two affidavits signed David Stoutenburgh were received by Fillmore, Hall & Haven through the mail. I can only say I have no recollection of the papers; I think it probable I did whatever was done with the papers; the law business of the firm of Fillmore, Hall & Haven was then done usually in my name as attorney. Hall of that firm was then commissioner of deeds, and took the affidavit to which his name appears as commissioner; I am not acquainted with either of the parties to this suit; do not know that I ever personally saw any of them until this court; I was introduced to the gentleman now sitting by Mr. Barker, now acting as defendant's counsel, as Mr. Frost, one of the defendants. I acted for the firm of Fillmore, Hall & Haven; I assumed to act as the papers state; I can't tell from any recollection of where the goods were when attached; am not aware I ever saw them; I recollect of the attachment being published in the Argus and New York American.

*Question.* Who was or were your client or clients when you instituted the attachment proceedings in 1888?

*Answer.* I assumed to act as attorney of defendants, and was and am myself responsible to \$5,000 and upwards, and am individually able to pay any and all claims that can be legally established against me; I acted under and in pursuance of letters received by our firm, and which as well as other letters touching the attachment and the foundation thereof I have brought, in compliance with the plaintiffs' *subpoena duces tecum*, and hold in my hand (witness exhibits a parcel of papers one and a half to three inches thick), and which I will produce if the court so orders, not without.

*Question.* By whom do these letters, under which you assumed to act as such attorney in issuing such attachment, purport to be signed?

Defendants object to the question; judge overrules the objection; witness answers. We have quite a number of letters

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from defendants, but I have no letters from defendants which solely retain said Fillmore, Hall and Haven. Defendants renew their objection to the question. Judge decides that witness need not speak in regard to any letter or communication which contains other than a mere retainer. Plaintiffs excepted to the decision of the judge; plaintiffs ask the witness to produce to the circuit judge, for his private inspection, the letters so received by his law firm Fillmore, Hall & Haven, retaining them in the attachment proceedings; and the judge direct the witness how much thereof to read. Defendants object to the question; judge decides to sustain the objection; plaintiffs \*except to the decision. Plaintiffs ask the [\*224] witness to produce the letters so retaining his law firm to institute the attachment proceedings, and allow no part thereof to be seen, except the signatures thereto, so that the same may, by a person acquainted with defendants' signature, be proven, and if proven to be the defendants', that this witness communicate only so much, and such parts thereof as retains the witness's law firm to institute the attachment? Defendants object to each and every part of the question; the circuit judge decides to sustain the entire of said objections; plaintiffs except to the decision. Plaintiffs request the witness of the letters to his firm, in relation to the attachment proceedings, to cover up with some opaque substance, or to obliterate all those parts containing communications other than retainer and directions as to the same, and then to produce the letters to prove the signatures thereto, and if proved to be the defendants' signatures, to read the same. Defendants object to the question or proposition, and each and every part thereof. Judge decides to sustain the objection; plaintiffs except to this decision. Witness says, I wrote to defendants in September, 1838, and letters I hold in my hand were received in reply. I did not, I think, write to defendants in August, 1838, but I did in September, 1838, correspond with them; my letters to defendants were superscribed Frost & Dickerson, New-York city, and the letters I hold purport to be answers to them. Witness is asked to read over the memo

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random or description of a note at the top or beginning of one of the affidavits of David Stoutenburgh, and says. Fillmore, Hall & Haven had a note of the description of the one described in Stoutenburgh's affidavit; it came to their hands after the attachment was issued from New-York or Pittsburgh, don't remember which; I have had claims sent to me by defendants, other than the one about which inquiry is made: I have no knowledge nor recollection of any trustees being appointed in the attachment proceedings.

*A. Mackenzie Ross* testified: I know neither of the parties to this suit; I signed and swore to the affidavit in the attachment proceedings purporting to be signed by me.

*Thomas I. Agnew* testified: I reside in New-York city. In '38 I was in the employ of Townsend & Brothers in New-York city. During '36 and '37, I was in the employ of Philemon H. Frost & James S. Dickerson, knew both of them; they, during those years, and in 1838, and for several years before and after that year, constituted the firm of Frost & Dickerson. The correspondence of that firm was done chiefly by defendant Frost; I left them at commencement of 1838; I

[\*225] have seen them write and know their \*handwriting;

I was and am well acquainted with David Stoutenburgh and his handwriting, and have seen him write; he was, during 1838, and for several years before, and after that year the book-keeper and general plenary agent of defendants. The signatures, David Stoutenburgh, to the two affidavits above referred to, are I believe in his (David Stoutenburgh's) handwriting. A letter in words and figures as follows:

" *New-York, April 13, 1839.*

" GENT—We have instructed our lawyers at Buffalo to remit to you Taylor, Moore & McGriff's note for five hundred and forty dollars and fifty cents, due April 13th and 16th, 1838, protest and postage to be added is three dollars and seventy-five cents; we attached their goods at Buffalo last September on the said note; the marshal let them remain in a commission warehouse; the said warehouse, with the goods



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(attached), of Taylor, Moore & McGriff, was all consumed by fire last February (there was no insurance on them). Our object in having the note sent to you is, for the purpose of instituting suit if you think it advisable; we do not think that they can raise a legal offset in consequence of the loss of the said goods by fire in Buffalo. If you think they can, do not institute suit; it is somewhat doubtful whether the note reaches you ten days before the sitting of your county court. We, however, conclude that it will make no difference, as we have given you the amount of said note when due, and the note is payable to Frost & Dickerson; their names are Philemon H. Frost and James S. Dickerson; the note will reach you, beyond all doubt, by the 25th or 28th inst.

"Respectfully yours,

"FROST & DICKERSON.

"Messrs. White & Lockwood, Lafayette, Indiana."

and its superscription in the words and figures as follows:

"WHITE & LOCKWOOD. "25."

"New-York, April 13.

Lafayette, Indiana."

is here shown witness by plaintiffs, and he says: the signature to that letter is in the handwriting of defendant Frost; the defendants were active men in their business, and both of them knew what was going on in their store. The last above letter is now offered in evidence; defendants object to the same, on the ground that White & Lockwood were of the profession of attorneys, and that it was directed to them by defendants as their attorneys, and defendants produce and show the circuit judge what they claim as a reply thereto, purporting to be signed "White & Lockwood," and call

*Theodore M. Parmelee*, who testifies: I know White, formerly a member \*of the House of Representa- [\*226] tives, and senator in Congress; have seen him write, and know his handwriting; the signatures "White & Lockwood" to the letter is in his handwriting. He was reputed to be a lawyer from Indiana; I think his name is Albert.

*Cross-examined.* I don't know of White being a merchant

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in Lafayette, Indiana ; I never knew him in Indiana ; do not know Lockwood ; all I know of White is as a member of Congress in Washington, District of Columbia. Defendants call

*Lucius F. Tiffany*, who testifies : I was at Lafayette, Indiana, last year, in the spring ; there became acquainted with Albert White ; had business with him as a lawyer, and he was reputed to be a lawyer. He was acting as a lawyer for me ; I there saw a lawyer by the name of Lockwood ; he was the lawyer of the party adverse to us in a suit.

*Cross-examined.* I was never in the state of Indiana but once, and that in the spring of last year, and had no knowledge of White or of Lockwood prior to that time ; said White & Lockwood were not then in copartnership. I knew not of any mercantile firm in Lafayette by the name of White & Lockwood, and do not know but there might have been such mercantile firm in Lafayette. The letter purporting to be from White & Lockwood to defendants, in reply, is denied by the court to be seen by other than the circuit judge, and defendants cease further proof of same. Plaintiffs now offer to read the said letter from defendants to White & Lockwood. Defendants object to the reading of the same. Judge decides to sustain the objection. Plaintiffs except to this decision. Plaintiffs offer to read only so much of this last letter as indicates defendants' direction to their attorneys in Buffalo to forward the note. Defendants object to reading the same. Judge decides to sustain the objection. Plaintiffs except to this decision.

Plaintiffs now produce testimony taken on commission, and *de bene esse*, to prove plaintiffs' damages by reason of the attachment. Defendants object to reading the same, for the reason solely that defendants have not been connected with the attachment. Plaintiffs contend, for sundry reasons, that the defendants are liable. 1st. That the law firm of Fillmore, Hall & Haven, in the name of one of that firm, did act as attorneys for defendants, the attaching creditors in the attachment, and the said law firm being proven responsible for any claim against them, the

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defendants are bound by the acts of said law firm, and must look for their damages to said law firm, if their acts were unauthorized by defendants. 2d. That the very fact of Mr. Frost, one of the defendants in court and on this trial, \*sitting by his counsel, and through that counsel ob- [\*227] jecting to the reading of so much of defendants' letters as retains Fillmore, Hall & Haven in the attachment; also the facts of the affidavits of Stoutenburgh, used in the attachment, being received by Fillmore, Hall & Haven, in a letter from defendants directing the attachment; also the fact Fillmore, Hall & Haven were at the same time with the issuing of the warrant of attachment in correspondence with defendants as attorneys for them in other matters, as well writing as receiving letters; also the fact that Stoutenburgh, whose affidavits were so received, was proven to be at that time book-keeper and clerk, and general agent for defendants, indicated sufficient to go to the jury upon the question whether Fillmore, Hall & Haven were not attorneys for the defendants, attaching creditors in attachment, and further that attorneys were recognized both by statute and this court, in proceedings against non-resident debtors, &c., and that defendants could not deny the relation of attorney and client, but must take their remedy against the attorney who assumed to act, if he acted without authority or improperly, the said attorney being shown to be abundantly responsible, and it not being pretended that he acted through collusion with plaintiffs, and then plaintiffs offered to read said testimony on commission, and *de bene esse*, to show the damages, and then go to the jury. Defendants again objected to proceedings farther in the trial to prove damages by the attachment, inasmuch as defendants were not liable for the acts of Fillmore, Hall & Haven, or either of them, as attorneys for defendants as attaching creditors in the attachment. The circuit judge decided to sustain this objection; plaintiffs excepted to this decision; plaintiffs then asked to withdraw one of the jurors, by reason of the decision of the judge having decided sufficient was shown to make probable White & Lockwood were attorneys, so that he

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ruled out the above letter of defendants to White & Lockwood, and further offered to show by affidavit, 1st. That there was no address about the letter indicating White & Lockwood were attorneys, or other than merchants, prudent correspondents of defendants in Lafayette, Indiana. 2d. That in introducing said letter, it was not known, intimated to, or suspected by said plaintiffs' attorney or their counsel, that said White & Lockwood were attorneys. The judge remarked he would grant the application to withdraw one of a jury, but for making a precedent which might hereafter be rendered inconvenient; and the circuit judge decided to grant a nonsuit, to which decision plaintiffs excepted, and thereupon the judge granted permission to make a case, with privilege to use the same also as a bill of exceptions.

[\*228] \*George L. Marvin, attorney for plaintiffs, stated in his affidavit that all the testimony and statements of proceedings on the trial were truly and correctly set forth above, and that a deposition, signed and sworn to by Solomon G. Haven (one of the witnesses sworn on the trial), the 5th day of January, 1842 (in which deposition Haven swore he was attorney for Frost and Dickerson; in procuring the attachment mentioned in the foregoing testimony of Dyer Tillinghast, and stated substantially the same as given in his testimony above), was shown to Haven on the trial, and he testified that the deposition was made by him as it purported to have been. Marvin stated that he was surprised on the trial, in not being able to bring home, by the testimony of Haven, to defendants, positive knowledge and absolute direction of the attachment proceedings, and also at the attempt to prove Messrs. White & Lockwood (to whom the letter above copied was directed) were attorneys.

Le Grand Marvin, law partner of plaintiff's attorney, and counsel for plaintiffs, stated in his affidavit that he prepared the cause for trial at the last June circuit. In May last he made sundry inquiries of David Stoutenburgh, of New-York city, as to the knowledge of the defendants Frost & Dickerson, or either of them, of the attachment; to which inquiries

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Stoutenburgh refused to reply at that time. A day or two subsequently, Marvin again repeated his inquiries of Stoutenburgh, and to which no reply was received, but a refusal to converse on the subject. Marvin then informed him he should send a subpoena for him to attend as a witness at Buffalo, which he did on the 5th of June, but Stoutenburgh had then left for Ohio. Marvin then inquired of Haven, by what authority he instituted the attachment proceedings, and to be shown the same if in writing. Haven replied he had abundance of authority, signed by the defendants, as he supposed, but he did not know the defendants' handwriting, that he would have that authority present at the circuit, as he was required by his *subpoena duces tecum*, and there would be no doubt of the authority being sufficient; but Haven absolutely refused to let Marvin see the paper or writing containing such authority, or to inform him in what form or character such authority was. On the 10th of June, 1846, Marvin sent a subpoena to New-York to have it served on some person that knew the handwriting of both defendants. On 16th of June, the subpoena was returned with proof of service on Thomas L. Agnew, of the city of New-York, who was present on the trial as a witness. The original letter, from the defendants Frost and Dickerson to White & Lockwood, had no indication of White & Lockwood being attorneys, nor did Marvin suppose them \*or either of them to be attorneys, but believed [\*229] that the letter was to a commercial firm in which the defendants had friendly confidence, it being addressed on the outside, Messrs. White & Lockwood. Marvin stated that he did not expect the letter would be of any use to him on the trial, until June 10, 1846, when he found Stoutenburgh was not subpoenaed as a witness, as he had relied upon the testimony of Stoutenburgh and Haven to bring home to the defendants a privity with and direction of the attachment, as well before as after the attachment proceedings were instituted. Marvin alleged that he believed, from information, that Stoutenburgh had been bribed, or otherwise induced by the defendant Frost, to leave this state, just at the time he

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Taylor agt. Frost.

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had been told by Marvin that he would be subpoenaed; that Frost had a store, or some kind of interest in a store, in or about Norwalk, Ohio, and that probably Stoutenburgh had been sent out there by Frost, to attend to his (Frost's) matters, until after the trial of this cause. Stoutenburgh was formerly, for a number of years, in the employ, as book-keeper, of the defendants, and been recently started in business under the actual patronage, if not with the actual credit or capital of Frost, and was a relative of Frost. The defendants, Frost & Dickerson, appeared to the declaration in this cause by Solomon G. Haven, Esq., their attorney. Afterwards B. B. Burt, Esq., was substituted in the place of Haven.

On the part of the defendants Frost & Dickerson, it was denied that the defendant Frost had any store, or interest in any store, in or about Norwalk, or elsewhere in the state of Ohio. That he (Frost) did not know when Stoutenburgh left New-York to go to Ohio, he did not send him to Ohio, nor did he go there at his request, nor did he send him there or elsewhere to avoid the service of a subpoena in this suit. Stoutenburgh attended to no matters for him while he was so absent, that Stoutenburgh was not started or continued in business under the patronage of Frost, nor with his credit or capital, nor was he, in any way, under his (Frost's) control. Frost stated his reasons for believing that plaintiffs' attorney and counsel knew that White & Lockwood were attorneys, and that they knew the letter offered in evidence, addressed to "White & Lockwood," was a communication to them as attorneys.

Stoutenburgh, in his affidavit in opposition to this motion, denied that he refused to reply to the questions of Marvin in relation to the attachment proceedings, but answered him distinctly that he had no recollection of them. That he went to Ohio at the time he did, in pursuance of his designs formed long before he knew this cause was to be tried; he [\*230] did not leave before, or return later on account of being absent at the time of the trial, and denied that he was bribed, or otherwise induced or influenced by Frost or

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Taylor agt. Frost.

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any other person to go to Norwalk, Ohio, as before mentioned, and that he did not attend to any matters or business for Frost while he was so absent. Defendants' attorney stated that he offered to stipulate with plaintiffs' attorney, last April or May, to have the testimony of Stoutenburgh, Grosvenor and Starr taken in the city of New-York (who were all there at that time), before a commissioner, and save the trouble and expense of their going to Buffalo, which Marvin declined to do. The defendants' counsel who tried this cause stated that the affidavit of plaintiffs' attorney, purporting to give a statement of the proceedings on the trial of this cause, was, in many respects, incorrect and erroneous, but did not make the corrections, supposing it unimportant, on motion for a new trial on the ground of surprise. Defendants' attorney stated that the attachment proceedings were claimed by the plaintiffs to be illegal, upon the ground that the affidavits upon which the same was founded did not distinctly show that the present plaintiff resided in Indiana, or that the debt on which the same issued was contracted in the state of New-York, the plaintiffs relying upon formal defects in the affidavits to sustain their action.

LE GRAND MARVIN, *plaintiffs' counsel*.

GEO. L. MARVIN, *plaintiffs' attorney*.

J. EDWARDS, *defendants' counsel*.

B. B. BURT, *defendants' attorney*.

BRONSON, Chief Justice. The plaintiffs were not nonsuited upon the principal question involved in the controversy, but for the failure to establish a subordinate fact, the retainer of Mr. Haven, about the existence of which there can be no doubt. They had, I think, exercised due diligence in preparing the cause for trial, and had good reason to believe that the evidence which they could produce would fully establish the retainer; but their evidence unexpectedly failed them on the trial, and they ask a new trial, on the ground of surprise. Although new trials are not often granted upon that ground,

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Seely agt. Crosby.

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I think the plaintiffs have made out a case which calls for relief in that form.

*Ordered*, that the motion be granted on payment of the defendants' costs of the circuit and subsequent proceedings.

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EBENEZER SEELY agt. ELISHA O. CROSBY.

An affidavit, made to hold a defendant to bail, should show a good cause of action, and it is not enough to swear to *advice and belief* merely, in relation to the charges which constitute the cause of action; but the affidavit [\*231] should go beyond a good cause of \*action, and show some reason why the defendant should be held to bail, and on this point *information and belief* merely is not enough.

*September Term, 1846.*

MOTION by defendant on appeal from an order of supreme court commissioner holding defendant to bail, and to set aside the order.

The affidavit upon which the defendant was held to bail by the commissioner read as follows: "State of New-York, county of Orange, ss. Ebenezer Seely, of the town of Chester, in said county, being duly sworn, deposes and says, that he is about to commence a suit, in the supreme court of said state, against Elisha O. Crosby, for criminal conversation with Maria Seely, the wife of this deponent; that the said Elisha O. Crosby has been guilty of criminal conversation with the said Maria Seely, *as this deponent believes and supposes he will be able to establish* by legal proof; that the said Elisha O. Crosby formerly resided at the town of Elmira, in the county of Chemung; that about the month of October, 1844, the said Elisha O. Crosby left the said town of Elmira with the said Maria Seely, and removed to the city of New-York, where, or at Williamsburgh, near said city, the said Elisha O. Crosby has ever since resided with the said Maria Seely in adulterous intercourse, as this deponent is *advised and believes to be true*; that at the time the said Elisha O. Crosby left the said town of Elmira, he was and still is largely in debt, as this deponent



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Seely agt. Crosby.

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is *informed and believes*, and that he had not at that time, nor has he since had, *as this deponent is informed and believes*, any property which could be reached by execution; that the said Elisha O. Crosby is wholly irresponsible, in point of property, as deponent is *informed and believes*; that the said Elisha O. Crosby is an attorney at law, having a very limited practice; that the said Elisha O. Crosby is now living in the city of New-York or Williamsburgh aforesaid, under such circumstances, as to property and business, that he can, at any moment, remove himself from the jurisdiction of the said supreme court without a sacrifice of any important interest, *as this deponent verily believes*; and this deponent *verily believes* that if the said Elisha O. Crosby were informed that this deponent was about to commence a suit against him for and on account of the said criminal conversation with the said Maria Seely, he would remove without the jurisdiction of the said supreme court to avoid the service of process therein; and this deponent is apprehensive that, unless he be held to bail, he will so remove without the jurisdiction of the said supreme court before process can be served upon him, or before judgment can be obtained against him." (The foregoing was italicised by the reporter to show the objectionable parts of it.) A *capias ad respondendum* was issued, and an order indorsed \*thereon by Nathan Reeve, a supreme court commissioner, residing at Newburgh, Orange county, dated February 16, 1846, holding defendant to bail in the sum of \$2,500. In May, 1846, the defendant made an affidavit, upon which Reeve, the commissioner, granted an order requiring plaintiff to show cause of action, and why defendant should not be discharged on common bail, or the bail be mitigated. On the day for showing the cause, the plaintiff appeared by attorney, and opposed the discharge of the defendant, or that the bail be mitigated, and after the commissioner had received the statements by affidavits on both sides, he refused to discharge the defendant, or to mitigate the bail, but allowed a stay of proceedings for twenty days, for defendant to serve his papers upon an appeal from his decision and order.

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Holt agt. Harrison.

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A. BENEDICT, *defendant's counsel and attorney.*J. H. COLLIER, *plaintiff's counsel.*WESTCOTT & GIDNEY, *plaintiff's attorneys.*

BRONSON, Chief Justice. The affidavit, on which the defendant was held to bail, neither makes out a cause of action nor shows any special reason for holding the defendant to bail. The plaintiff swears that the defendant has been guilty of criminal conversation with his wife, "*as this deponent believes and supposes* he will be able fully to establish by legal proof;" and again, that defendant is living in adultery with deponent's wife, "*as this deponent is advised and believes* to be true." This is all there is to show a cause of action, and it is not enough; but the affidavit must go beyond a good cause of action, and show some reason why the defendant should be held to bail; and on this branch of the case there is nothing better than *information and belief*, which is not enough.

*Ordered*, that the order which has been made at chambers, to hold the defendant to bail, be vacated, and that the defendant be discharged on filing common bail.

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ROBERT M. HOLT agt. TIMOTHY S. HARRISON.

Where a supreme court commissioner has made an order to discharge a defendant from his bail bond to the sheriff, upon his filing common bail, and common bail has been filed, and the bail bond to the sheriff *delivered up and canceled*, it is then too late to move to vacate the order of the commissioner discharging the defendant on filing common bail, the bond having been delivered up and canceled, the sheriff has no means of compelling the defendant to put in special bail. (*See ante*, p. 91.)

*It seems* that a plaintiff should show *clearly* a good cause of action, in order to hold a defendant to bail.

*September Term, 1846.*

MOTION by plaintiff to set aside an order of supreme court commissioner \*discharging defendant on filing common bail.

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Holt agt. Harrison.

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This was an action of trespass, *de bonis asportatis*, commenced by capias. Defendant was held to bail in the sum of \$200. The writ was returnable 18th of July last. On the 18th of July defendant appeared in the cause by attorney. On the 29th of July defendant's attorneys served plaintiff's attorney with an order to show cause of action before A. C. Farlin, Esq., supreme court commissioner residing at Glen's Falls, Warren county, on the 8d day of August, 1846, on which day the attorneys for the respective parties appeared before the commissioner, and plaintiff's attorney read and filed an affidavit as follows, to wit: (title, venue, &c.) "Robert M. Holt, the plaintiff in the above entitled cause, being duly sworn, deposes that, some time in the fore part of the month of June last, he owned and possessed the canal boat Oregon, and two horses, and that while he was so possessed, Timothy S. Harrison above named, the defendant in this cause, by force took the said boat from the possession of this deponent, and took the said horses from this deponent, and detained said boat and horses for the space of one week. And this deponent says that the interruption of his business, and his costs and expenses, in consequence of such seizure and detention, injured and damaged this deponent to an amount of not less than seventy-five dollars, and that said boat was seized and said injury inflicted before the commencement of this suit."

Defendant's attorneys read and filed a counter affidavit, which stated, in substance, that the defendant on his arrest gave the usual bail bond to the sheriff of Washington county, to whom the writ was directed and delivered, that no special bail had been put in by defendant, that the action was brought to recover damages alleged to have been sustained by the plaintiff, in consequence of the taking by the defendant of the personal property mentioned in a mortgage executed by the plaintiff to the defendant (a copy of which was annexed), such taking being under the mortgage, and as the defendant claimed by virtue thereof; the taking was on or about the 24th of June, 1846, and the property was advertised

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Holt agt. Harrison.

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for sale under the mortgage, the sale to be made on the 30th of June, 1846, at Glen's Falls, where the property was taken, the property being kept and detained by the defendant from the 24th to the 30th of June, for the purpose of the sale under the mortgage. At the time and place of sale the plaintiff and defendant attended, and the defendant, with the consent of the plaintiff, assigned the mortgage to one Charles Rockwell, and the plaintiff then, with the consent of Rockwell and the defendant, retook the mortgaged property, and after [\*234] wards and then held and enjoyed the same. \*This action was brought solely to recover damages pretended to have been sustained by the plaintiff, by reason of the said taking and detention of the mortgage property by the defendant for the purpose aforesaid, and for no other or different cause of action; that the taking and detention of the property by Harrison was in consequence of the advice given by his counsel and legal advisers, that he was authorized so to do, after the statement made by Harrison, *that he deemed himself in danger of losing the debt*, secured to be paid by the mortgage, by delaying the collection thereof until the time limited in the mortgage for its payment, and that such taking and detention and statement by Harrison was, as his attorney and counsel believed, in good faith. This affidavit was made by one of defendant's attorneys. It appeared from a copy of the mortgage annexed to the moving papers, that there was a clause contained in it, as follows: "but if default be made in such payment, or if the said party of the second part shall at any time deem himself in danger of losing the said debt or any part thereof, by delaying the collection thereof until the expiration of the time above limited for the payment thereof, the said party of the second part is hereby authorized to take possession of the said goods, chattels, and personal property, at any time either before or after the expiration of the time aforesaid, and to sell the same, &c." The mortgage was dated the 12th of June, 1846, and the sum secured by it was made payable on the *first day of November, 1846*.

The argument used before the commissioner against the

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Holt agt. Harrison.

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counter affidavit was, that it did not *show danger*. The reply was, that such was not the language of the mortgage, but that if the *mortgagee deemed himself* in danger. It was then urged that there was no evidence to show defendant *deemed himself* in danger. The reply was, that his consulting counsel and taking the property under that clause was evidence, and cited 2 *Denio*, 61, 68, where executors had power to sell, "if they *deemed* it necessary to pay debts." The objection raised in that case was, that it did not appear to be necessary. The court said, the fact of the executors' selling showed that they *deemed* it necessary, and whether they judged right or wrong was immaterial. The supreme court commissioner after the hearing made an order, bearing date August, 3, 184, that the defendant be discharged from his bail bond given to the sheriff upon filing common bail, and that the defendant be discharged from his liability to put in special bail. On the 27th of August defendant's attorneys served on plaintiff's attorney a notice that, in pursuance of the order of the commissioner, common bail had been filed by the defendant in the cause, and that upon serving a \*copy [\*235] of said order upon the sheriff, after filing common bail, the bond taken by the sheriff was delivered up and canceled. The facts in that notice were sworn to, by one of the attorneys for defendant, to be true.

N. HILL, JR., *plaintiff's counsel*.

A. T. WILSON, *plaintiff's attorney*.

D. WRIGHT, *defendant's counsel*.

ROSEKRANS & FERRIS, *defendant's attorneys*.

BRONSON, Chief Justice. It is not quite clear that the plaintiff has a good cause of action; and, besides, the bail bond has been delivered up and canceled. The sheriff has now no means of compelling the defendant to put in special bail. Motion denied.

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Smith agt. Van Patten.

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EDWARD SMITH, JAMES WOODS, and HENRY SMITH agt. PETER VAN PATTEN.

Where judgment was obtained against defendant by default, and he moved to set aside the default, &c., and for leave to plead, and, before the decision of the motion, defendant gave an endorsed note to plaintiffs' attorneys for the whole amount of the judgment, under a written agreement signed by plaintiffs' attorneys, conditioned that, if the motion was granted, and the defendant finally succeeded in the suit, the note should be returned to him; or if the motion was denied, or the plaintiffs finally succeeded in the suit, the note should become absolutely the plaintiffs'; and the motion was denied with costs, *without prejudice*. *Held*, that the defendant was precluded, by the agreement, from making the motion again to set aside the default, &c.

*September Term, 1846.*

MOTION by defendant to set aside default and subsequent proceedings.

This suit was commenced by declaration on a promissory note. Declarations served 16th of December, 1845. Defendant's attorney pleaded general issue and special plea, setting forth defendant's insolvent discharge. The pleas were signed by defendant's attorney, and his name and residence endorsed thereon as defendant's attorney, but not accompanied by an affidavit of merits, or affidavit of verification. The pleas were served by mail, on the 10th of January, 1846, the last day to plead under a stipulation from plaintiffs' attorneys. Plaintiffs' attorneys returned the pleas on the 13th of January, 1846, with a notice that they should proceed in the cause. Defendant's attorney received the pleas on the 14th of January, and on the same day drew an affidavit of merits upon the back of the pleas, and also an affidavit verifying the special plea, which was sworn to by defendant. The pleas thus verified and also another affidavit of merits made by defendant, and a stipulation to take short notice of trial, were tendered to plaintiffs' attorneys on the 16th of January, and an offer to pay the costs of default and subsequent proceedings, which were declined by plaintiffs' attorneys. The default [\*236] was entered and judgment perfected \*on the 13th of January, 1846. Venue in Oneida county. The next

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Smith agt. Van Patten.

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circuit after the service of declaration was the 3d Monday of April, 1846. The next circuit after the April circuit, the 4th Monday of September thereafter, defendant's attorney stated his excuse for not moving at February special term, that he was sick and confined to his house, and besides he did not receive the proof of the tender in time to prepare the papers for the motion so as to serve them by mail, he residing about forty miles from plaintiffs' attorneys. At the April special term, 1846, defendant moved to set aside the default, which motion was denied *without prejudice*. Defendant's attorney stated that he was informed that the motion was denied on the ground that no affidavit of merits was served with the papers for the motion. Defendant's attorney did not renew the motion at the June special term, for the reason that the motion made in April was not decided until June 2d, being in the June special term. The defendant stated, in his affidavit, that on the 16th of January, 1846, Tallman, one of plaintiffs' attorneys, called on defendant and informed him he had obtained judgment in this suit, and demanded payment or security for the same, and offered to take defendant's note, payable in one year, without an endorser, or a note payable in three years, with an endorser. Defendant informed Tallman that he had been discharged from his debts, and should rely upon that, and that he expected his attorney to set aside the default and judgment. That defendant refused to pay or secure the debt for the reason that he owed a large amount to other creditors, and he was under no greater obligation to pay or secure this than any other of the debts he had been discharged from; that he owed for goods purchased since his discharge, and for money which he had borrowed to pay towards such goods; he did not think it his duty to ask his friends to endorse for him, or to turn out his goods to secure old debts, which he had been discharged from. Defendant told Tallman he had money and could pay the demand, if he could not avail himself of his discharge. Defendant had no doubt but the default would be set aside, and he was willing to test the validity of

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Smith agt. Van Patten.

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his discharge. He told Tallman he would pay the debt if plaintiff finally succeeded in the cause.

On the 21st of January, Tallman caused defendant to be arrested upon a warrant issued by Hon. FRANCIS SEGER, first judge of Lewis county, counsellor, &c., under the act to abolish imprisonment for debt, &c., which was predicated upon the judgment in this cause, and granted upon the affidavit of Tallman, setting forth defendant's refusal to pay or secure the debt, as in the conversation above mentioned, and

[\*237] on the ground that defendant \*had money, or evidences of debt, which he unjustly refused to apply in payment of the judgment. In consequence of the sickness of his attorney at this time, defendant employed Hon. C. Dayan to defend him on this complaint. The hearing of the matter was adjourned to the 25th of April last, at which time defendant gave a promissory note to the attorneys for the plaintiffs for \$180.16, payable twelve months from date, endorsed by C. Dayan (who was perfectly responsible), under an agreement signed by plaintiffs' attorneys, which was as follows: "April 25th, 1846. Memorandum of agreement made this day, between Tallman & Johnson, as attorneys for Messrs. Edward Smith, Son & Co., of New-York, and Peter Van Patten, of Louisville, as follows: said Van Patten has this day given his note at twelve months for \$180.16 with interest, the amount of a judgment recovered against said Van Patten in the supreme court, and said Van Patten has made a motion in the supreme court to open said default and judgment, and be let in to plead; and if said Van Patten shall succeed on said motion, and also finally succeed in the defence of such suit after being let in to plead, then in that case the said note shall be returned to said Van Patten. But if said motion is denied, or the plaintiffs succeed in said cause, the said note to be the property of the said plaintiffs absolutely; said note is made payable to the order of and endorsed by Charles Dayan, at the Bank of Rome.

(Signed) "TALLMAN & JOHNSON,  
"Attorneys for plaintiffs, Rome."



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Smith agt. Van Patten.

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Defendant also stated that he believed it was the object of Tallman, in the conversation with him, to extort from him a promise to pay the debt, for the purpose of preventing him from availing himself of the benefit of his discharge, and that defendant's refusal to pay or secure the debt was made under such impression and belief.

On the part of the plaintiffs, the affidavit of William M. Tallman was read, which stated the same facts substantially, but more minutely detailed the conversation which he had with defendant, in which he stated that defendant absolutely refused to pay one cent of the debt, whether his discharge was good or not; and stated that he had the money then in his pocket, and could pay the judgment in five minutes if he chose, but he never would pay one dollar of it under any circumstances, that he would give up business first. On the hearing of the complaint before Judge SEGER, on the 25th of April, after the proofs were closed and argument on each side, the judge ordered, that the defendant be committed to \*the jail of the county of Lewis, pursuant [\*238] to section 9 of the act under which he was arrested. To avoid such commitment, the defendant offered to pay the costs of the proceedings, and to give his note at twelve months, as mentioned in the above agreement; the costs were paid and the note and writing given as stated. After the motion at the April special term was denied, Tallman saw the defendant at Rome, who stated that by the denial of the motion, he (defendant) considered the matter settled and ended, and that the note belonged to the plaintiffs absolutely, and he should meet it at maturity, but that he intended to look to Mr. Knox for all he had to pay, in consequence of his negligence. After this last interview with defendant, Tallman stated that the note was indorsed by him, and transferred in due course of business, for a valuable consideration, to a third person, having had written instructions from plaintiffs, giving full authority to do as Tallman thought proper in the premises. That before the papers for this motion were served, Tallman & Johnson had dissolved their law partnership, and neither

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Follet agt. Sherman.

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the plaintiffs nor Tallman or Johnson had any control over the note, nor was it in their power to return it to defendant in any event.

J. A. COLLIER, *defendant's counsel.*

Z. KNOX, *defendant's attorney.*

H. H. MARTIN, *plaintiffs' counsel.*

TALLMAN & JOHNSON, *plaintiffs' attorneys.*

BRONSON, Chief Justice. The defendant has precluded himself from making this motion, by giving an indorsed note for the amount of the judgment, under an agreement which gives the plaintiffs an absolute right to the note in the event that the April motion should be denied. Although this is, in some respects, a hard case, we can give no relief.

Motion denied with \$7 costs.

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BENJAMIN FOLLET and DANIEL H. CHANDLER agt. ALLEN  
M. SHERMAN.

Where a party moves to set aside a default, &c., for irregularity, and shows a service of the pleading on the attorney for the opposite party, who entered the default, in consequence of not receiving such pleading; he must show that such service was made in *strict conformity to the rule*, otherwise he must pay costs to be let in.

*September Term, 1846.*

MOTION by plaintiffs to set aside default for not surrejoining, and all subsequent proceedings, for irregularity.

It appeared from plaintiffs' papers that this was an action of assumpsit commenced by *capias ad respondendum* on a promissory note. The writ served April 16, 1845. The declaration contained the common money counts, and other common counts in assumpsit. The defendant [\*239] pleaded three pleas, first the general issue; second, non assumpsit within six years; and third, that the action did not accrue within six years. Plain-

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Follet agt. Sherman.

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tiff replied to the second plea, concluding with a verification, and to the third plea concluding to the country. About Nov. 25, 1845, plaintiffs' attorney received a copy of rejoinder with notice to surrejoin. Plaintiffs' attorney stated that he served a copy of surrejoinder on defendant's attorney as follows: "And this deponent further saith, that on the 31st day of December, 1845, this deponent served the defendant's attorney with a copy of surrejoinder to the defendant's rejoinder, by inclosing the same in a wrapper and directing the same to said defendant's attorney at Newburgh, Orange county, where said defendant's attorney resided, as this deponent then believed, and depositing the same, so directed, in the post-office at Batavia, where this deponent resided, and paying the postage thereon: that this deponent usually marked his letters on which he designed paying postage with the letters Pd. and the initials of his name; that he has been particular, in serving papers in this suit, to have such service made according to the rules of this court, and has in some instances actually paid the postage instead of relying upon the postmaster. That this deponent has no doubt that he paid the postage on such surrejoinder unless the same was marked as aforesaid, and no instance has come to the knowledge of this deponent where the postmaster failed to mail a letter *as paid*, which was marked as above by this deponent, and a few days after said letter was mailed he paid his postage bill in full." On the 27th May, 1846, plaintiffs' attorney mailed to defendant's attorney a notice, requiring him to answer the surrejoinder in twenty days after service of such notice; and that from the time of serving the copy surrejoinder until the service of a copy bill of costs on the 18th day of June, 1846, he received no communication or intelligence from the defendant (who was an attorney of this court) or his attorney on the subject of this suit. The plaintiffs' default for not surrejoining and rule for final judgment were entered 18th March, 1846; a copy bill of costs and notice of taxation served on plaintiffs' attorney, June 18, 1846. Plaintiffs' papers showed the correspondence between plaintiffs' attorney and defendant,

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Doctor agt. Kendall.

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in relation to opening the default, which defendant declined to do. Defendant's papers showed that about the time a surrejoinder was due from plaintiffs' attorney, and for several days afterwards, defendant and his attorney were very diligent in their inquiries, at the post-office at Newburgh, for letters or packages to defendant or his attorney, and especially any which were mailed at Batavia, and they were told by the post-master none such had been received, and that they [\*240] \*never received or saw any surrejoinder in this suit, and believed no such pleading or paper had been served.

A. TABER, *plaintiffs' counsel.*

R. PROUDFIT, JR., *plaintiffs' attorney.*

M. TAGGART, *defendant's counsel and attorney.*

BRONSON, Chief Justice. The surrejoinder was not received, and as the proof of service by mail is not in strict conformity to the rule, I think the plaintiffs must pay costs. *Ordered*, that the plaintiffs' default for not surrejoining and all subsequent proceedings on the part of the defendant be set aside, and that the plaintiffs have leave to surrejoin, on payment of the costs of the default and subsequent proceedings, including seven dollars costs of opposing this motion.

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ISAAC DOCTOR agt. ROBERT KENDALL and JOSHUA L. BROWN.  
JOHN BLACKSMITH agt. The Same.

Where, in an action of trespass, the declaration contained two counts in *trespass quare clausum fregit* for the same cause of action, and the counts being alike except the town in which the *locus in quo* was situated: Defendant moved to strike out one count on the ground of duplicity, and as calculated to embarrass and increase the expenses of the defence: *Held*, that it might be necessary to retain both counts, to avoid any question about the town in which the *locus in quo* was situate; the plaintiffs' attorney showing they were inserted in good faith, and a belief that they were necessary to secure the plaintiffs' rights.

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Doctor agt. Kendall.

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*September Term, 1846.*

MOTION by defendants to strike out the fourth count of the plaintiff's declaration in each cause.

This was a motion to strike out the fourth count of the plaintiffs' declarations, on the ground of duplicity, the third and fourth counts being for the same cause of action. The affidavit of defendants' attorney stated that these were actions of trespass; the suits were commenced by declaration, copies of which were annexed to the moving papers, by which it appeared there were four counts; the two first being counts for assault and battery, the third and fourth counts for trespass *quare clausum fregit*. The third counts commenced as follows: "and also for that the said defendants on the same day and year, and at the place last aforesaid (being stated in the second count, 'at the town of *Pembroke*, in the county of Genesee, to wit, at Batavia in the said county of Genesee,') with force and arms broke and entered the close, &c." The fourth counts commenced as follows: "and also for that they, the said defendants, on the said day and year, and at the town of *Alabama*, in the county of Genesee, to wit, at Batavia in the county aforesaid, with force, &c." The third and fourth counts being substantially the same, except \*the town [\*241] in which the *locus in quo* was situated. Defendants' attorney stated that the defendants had a good defence to the actions, but believed such defence would be embarrassed, and the labor and expense thereof greatly increased by the duplicity of the declarations, the third and fourth counts not even purporting to be for different causes of action, and believed they were framed and made double for the purpose of embarrassing the defence and increasing the labor and expense thereof, and obtaining some technical advantage. Plaintiffs' attorneys denied that the declarations were framed with four counts as stated, with a view to embarrass the defence or increase the expense thereof, or to obtain any technical advantage, but were drawn in good faith, and they believed all the counts were necessary to secure the plaintiffs' rights.

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 Gardner agt. Teller.
 

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J. A. COLLIER, *defendants' counsel.*

J. L. BROWN, *defendants' attorney.*

N. HILL, JR., *plaintiffs' counsel.*

VERPLANK & MARTINDALE, *plaintiffs' attorneys.*

BRONSON, Chief Justice. It appears that the fourth count was inserted in good faith, and in the belief that it was essential to the plaintiffs' rights; and it is not certainly clear but that the count may be necessary for the purpose of avoiding any question about the town in which the *locus in quo* is situate. The addition of that count can not put the defendants to much trouble or expense. *Motions denied.*

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#### ISAAC GARDNER agt. DANIEL W. TELLER.

Serving a declaration in this count, with notice to plead in *ten* days instead of twenty, is an irregularity. (*See 2 Howard, 97.*) But if the defendant's attorney serve a *notice of retainer generally*, it is an appearance which waives the irregularity (no bail being required). (*Rule 26.*)

An appearance is a waiver of irregularities in the process to bring the party into court. (*7 Cow. 366; 7 John. 207.*)

A declaration and notice are in the nature of process.

*September Term, 1846.*

MOTION by defendant to set aside declaration and notice, for irregularity.

The defendant's affidavit showed, that on the 24th of June, 1846, he was served with a copy declaration purporting to be filed in this cause, in this court, with a notice thereon endorsed as follows: "Take notice that you are required to plead to the declaration, filed pursuant to the statute, in this cause, of which the within is a copy, in ten (10) days after service of a copy of the said declaration and of this notice, or that your default will be entered, dated, &c." It appeared, from defendant's papers, that on the 21st of July last, plaintiff's attorney served a notice to plead in *twenty* [\*242] days, on defendant's attorneys, which they refused \*to

receive, and returned it to plaintiff's attorney, on the ground that notice of this motion had been given, and there was no offer by plaintiff's attorney to pay costs.

It appeared, from the affidavit of plaintiff's attorney, that the day after service of a copy declaration and notice on defendant, to wit: on the 25th of June last, a notice of retainer, in behalf of the defendant, signed by defendant's attorneys, was served on plaintiff's attorney. The attorney for plaintiff was absent from home when the notice of retainer was served, and also when the first notice of motion was served by defendant's attorneys. He returned on the 15th of July last, and found that the defendant's notice of motion was for the first Tuesday of August last. On the 17th of July, plaintiff's attorney made propositions, verbally, to defendant's attorneys, to correct the mistake in the notice to plead, endorsed on the declaration, which were not assented to by defendant's attorneys; and on the 21st of July, plaintiff's attorney served a written notice to plead in *twenty* days (as above mentioned) on defendant's attorneys; and two days afterwards he received from defendant's attorneys an amended notice of motion for this September special term. No default had been entered in the cause. Defendant's counsel cited 2 *Howard*, 97, and *Statute*, 1840.

L. BENEDICT, JR., *defendant's counsel*.

NOBLE & L'AMOUREUX, *defendant's attorneys*.

G. R. J. BOWDOIN, *plaintiff's counsel*.

S. CLIFT, *plaintiff's attorney*.

BRONSON, Chief Justice. Serving a declaration with notice to plead in *ten* days, instead of twenty days, was irregular. But the defendant's attorney served a notice of retainer generally, which is an appearance where no bail is required. (*Rule 26*.) And an appearance is a waiver of irregularities in the process to bring the party into court. (7 *Cow.* 366; 7 *John.* 207). The declaration and notice are in the nature of process. Motion denied, with \$7 costs.

## ELIZABETH HILL agt. JAMES SMITH, Sheriff, &amp;c.

*Appearance* is a waiver of irregularity in process to bring the defendant into court.

A notice of motion should *sufficiently* point out the matters which are the subject of the motion. Where an *irregularity* is cured, *after motion papers are served* to set it aside, the moving party is entitled to his costs of motion.

*September Term, 1846.*

MOTION by defendant to set aside declaration, together with such other proceedings in this cause as to the court should seem proper.

It appeared from the moving papers that this was an action of replevin. (Copies of the writs of replevin were [\*243] annexed.) That the writ was served before \*the return day thereof, and the property named therein delivered to the plaintiff, or some one in her behalf. (A copy of the summons was annexed), that the summons was not signed by the officer serving the same; that the affidavit annexed to the writ was not made by the plaintiff, nor any reason assigned in it why it was not made by him; that the affidavit did not state that the person making it knew the ownership of the property, nor any thing to that effect. On the 17th of August last, defendant's attorney was served with a declaration in this cause (a copy of which was annexed). The plaintiff declared against the defendant for more property than was mentioned or set forth in the writ of replevin. It appeared, from the plaintiff's opposing papers, that the writ of replevin was issued on the 19th of May, 1846, which was accompanied by an affidavit made by James Hill in behalf of the plaintiff; that said plaintiff was the owner of, and entitled to the possession of the property described, &c. The writ was returned on or about the 16th of July last. The defendant was not arrested, nor any bail taken. Defendant was served with a summons at the time of the execution of the writ, which the coroner stated he believed was signed by him as coroner; that the copy summons returned by him was thus signed. On the 26th of May last, defendant's attorney served



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Shaw agt. Kidder.

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a notice of retainer in this cause, on plaintiff's attorney. On the 12th of August last, plaintiff's attorney filed a declaration in the cause; and served a copy, with notice to plead, &c., on the same day, on defendant's attorney. After the filing and service of the declaration, plaintiff's attorney discovered that the declaration on file, and the copy served, did not correspond with the writ: the variance consisted in this, that the writ described, among other property, "two cosset sheep," and the declaration reciting it "four cosset sheep." On the 25th of August, plaintiff's attorney filed an amended declaration corresponding with the writ; and served a copy as amended on defendant's attorney, on the 27th of August.

It appeared, from the copy summons annexed to the moving papers, that it was not signed by the coroner. It also appeared that the papers for this motion were served on the plaintiff's attorney, on the 22d of August last.

WILLIAM NELSON, *defendant's counsel and attorney.*

E. YERKS, *plaintiff's counsel.*

CHARLES GA NUN, *plaintiff's attorney.*

BRONSON, Chief Justice. Appearance is a waiver of irregularity in process to bring the defendant into court. And besides, the notice of motion does not sufficiently point to the setting aside of any thing prior \*to the [\*244] declaration: that has been amended since notice of this motion was given, and now all is right. *Ordered*, that the motion be denied on payment of \$10 costs of the same by the plaintiff, which she is hereby directed to pay.

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ZADOCK E. SHAW agt. ELLIOT J. KIDDER.

*Counsel* can not settle a suit and conclude the client in relation to the subject in litigation, without his consent; but they may make arrangements concerning the progress of the cause, as the putting off of a trial and the like, without any special authority from the client. (1 *John*. 507; 1 *Caines*, 252.)

Where defendant's *counsel* settled a suit with plaintiff's attorney, and it appeared

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Shaw agt. Kidder.

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he acted in perfect good faith, but without adequate authority, on a motion by defendant for judgment as in case of nonsuit, it was granted, unless the plaintiff stipulated to try: costs to abide event, as the plaintiff was not in fault.

*September Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

Defendant moved on the usual affidavit, that the cause was at issue, and noticed for trial at the last August circuit, but not brought to trial, &c. Plaintiffs produced a writing in opposition to the motion, which read as follows: ("Title of the cause) This cause is hereby settled, each party paying his own costs. August 18, 1846.

"HENRY R. MYGATT, *plaintiff's attorney.*

"SAYRE & BANKS, *of counsel for defendant.*"

The affidavit of William S. Sayre stated that Sayre & Banks were employed as counsel in this cause by defendant; that in consequence of the absence of defendant's attorney, L. Bigelow, Esq., they had done most of the attorney's business after the suit was commenced, and made the brief for the trial, the attorney having informed them that he should have nothing to do in trial, he being a witness in the cause; that Sayre & Banks had had possession of all the pleadings in the cause before joining issue. At the Chenango circuit, a conversation was had, about the settlement of the suit, with plaintiff's attorney; and it was then agreed, that as the matter was then situated, there was nothing pending between the parties but the costs. Plaintiff's attorney made a proposition for settlement, which was declined by Sayre. Subsequently, the defendant told Sayre he presumed the plaintiff would settle, if he (defendant) would pay his own costs, and let the plaintiff have the papers which had been tendered, and asked the opinion of Sayre whether he had better do so. After considerable conversation about the matter, Sayre advised defendant to do it, re-  
[\*245] marking \*at the same time that he thought the defendant would succeed, but he might be mistaken. That he thought it would be best to settle in that way if he

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Shaw agt. Kidder.

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could. The defendant replied that he would do it, or words to that effect. Mr. Humphrey, the assignee of the plaintiff, was not then at Norwich (where the circuit was held), so that a settlement could be effected, and the defendant went away after his witnesses. While defendant was thus absent, Mr. Humphrey came, and the subject of a settlement was again renewed between Mr. Mygatt, plaintiff's attorney, and Mr. Humphrey, Mr. Bigelow, defendant's attorney, and Mr. Sayre. Mr. Mygatt inquired of Sayre what was the best the defendant would do. Sayre replied that he probably would or might be induced to pay his own costs. After a conversation between plaintiff's attorney and defendant's attorney, plaintiff's attorney requested to negotiate with Mr. Sayre, and to see the papers which had been tendered by the defendant. Sayre procured them from defendant's attorney, and showed them to Mygatt. Sayre soon after saw Bigelow, and told him he thought he could effect a settlement with Mygatt in a short time, by each party's paying his own costs, and the papers being delivered to plaintiff's assignee. Bigelow then walked away, as Sayre supposed, to await the result. In a short time after the conversation with Bigelow, Sayre & Mygatt concluded the settlement according to the written agreement. After the writing was drawn, Sayre went after Bigelow to have him sign the agreement, and, being unable to find him, he remarked to Mygatt that he presumed it would make no difference, as he, Sayre, considered himself authorized by the defendant to settle on those terms, and Sayre then signed the agreement for himself and partner. That he acted in perfect good faith, believing that he was authorized to do so, and that in his opinion it was the best thing defendant could do, and he had no doubt but that Bigelow would have done the same, if he had been found. The reason Sayre did not wait longer for Bigelow, was, that himself, Banks and Bigelow intended to return home that afternoon if this business was arranged in time. Sayre supposed they would get home in time to save defendant from going to court with his witnesses, if they could start soon. The affidavits of Mygatt and Silvester Humphrey

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Shaw agt. Kidder.

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corroborated the principal facts, as stated by Sayre, and showed that Sayre was responsible for several thousand dollars. The defendant, in answer, showed by the affidavit of the defendant, that he never gave his counsel (Sayre & Banks), or either of them, authority, or even requested them, or either of them, to settle the cause. On the 12th of [\*246] August, defendant left Norwich, \*where the circuit was held, for the purpose of procuring the attendance of his witnesses, and returned on the 13th of August with his witnesses, and was informed by Sayre that he had settled the cause with plaintiff's attorney, and delivered over to him the deed and other papers which were the subject matter of the suit. Defendant then informed Sayre, that he (Sayre) was not authorized nor requested to settle the suit, and requested him to restore the papers and the cause to the position he left them, which Sayre could not, or declined doing. On the same day defendant procured for his attorney a written notice, which stated in substance that Sayre was not authorized to settle the suit, and that the defendant disavowed and disaffirmed the settlement, and would proceed to the trial of the cause at that circuit, and if the plaintiff declined trying it, he should move for judgment as in case of nonsuit, at the next special term. Such notice was served on plaintiff's attorney on the 13th August last, who declined to try the cause, and told defendant he might discharge his witnesses. The affidavit of defendant's attorney stated that he never authorized or requested Sayre to settle the suit, and that he (defendant's attorney) never had any authority from defendant to settle it.

J. A. COLLIER, *defendant's counsel.*

LEVI BIGELOW, *defendant's attorney.*

H. H. MARTIN, *plaintiff's counsel.*

H. R. MYGATT, *plaintiff's attorney.*

BRONSON, Chief Justice. Counsel may make arrangements concerning the progress of the cause, as the putting off of a trial, and the like, without any special authority from the

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Travis agt. Hill.

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client (1 *John*. 507, 1 *Cuines*; 252); but they cannot settle the suit, and conclude the client in relation to the subject in litigation, without his consent. In this case the counsel acted in perfect good faith, but without adequate authority. The plaintiff must try the cause: but, as he has not been in fault, he ought not to be charged with the costs of the circuit, or of the motion, except in the event that the suit shall terminate against him.

*Ordered* judgment, as in case of nonsuit, unless the plaintiff stipulates to try the cause at the next Chenango circuit. The costs of the last circuit and of this motion are to abide the event of the suit.

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TRAVIS, Assignee, &c. agt. HILL *et al.*

Special bail piece, reciting the action *trespass on the case*, put in, to an action brought by *capias* describing the action as *trespass* (for assaulting and having criminal conversation, &c.), is irregular. Where plaintiff's attorney treated such a special bail piece as a nullity, and, without returning the copy and notice thereof served on him, \*or advising defendant's attorney of [\*247] the mistake, took an assignment of the bail bond to the sheriff, and brought an action thereon; *held* (although considered sharp practice), that the defendant must pay the costs of the bail bond suit on setting the same aside, without costs of the motion.

*September Term, 1846.*

MOTION by defendant to set aside the proceedings in this cause, as irregular.

This was a motion to set aside the proceedings of the plaintiff in this cause, which was brought on a bail bond given in a suit, entitled "Supreme Court, Stephen D. Travis agt. Addison Hill," for irregularity or for relief on terms.

The only point was this: The *capias* in the original suit preceding the *ac etiam* clause read as follows: "in plea of trespass." And the special bail piece put in by defendant, after giving the names of special bail, &c., read as follows:

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Travis agt. Hill.

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"in a plea of trespass on the case." On the part of the plaintiff, it appeared that on the 19th of May last, defendant, Addison Hill, was arrested on the *capias* in the original suit, and gave a bail bond to the sheriff to appear in the action, by putting in and perfecting special bail, according to the practice of the court. The writ was returnable on the 6th of July, 1846, and was returned on or before the return day. Plaintiff's attorney not having received notice of the appearance of defendant in the suit, on the 22d of July last filed his declaration *de bene esse*, and more than twenty days having elapsed after the return day of the writ, and the defendant not having put in special bail *to the action*, the plaintiff took an assignment of the bail bond given to the sheriff, and brought this action. Defendant showed that special bail was filed on the 23d of July, and copy and notice thereof served on plaintiff's attorney on the 25th of July, together with notice of retainer of defendant's attorneys. Defendant's attorneys stated, they had never received any notice from plaintiff's attorney, relating to the original suit, and that the copy bail piece and notice, and notice of retainer had never been returned by plaintiff's attorney, and they never knew but that the proceedings in reference to the special bail were satisfactory to plaintiff's attorney until this suit was commenced. It appeared that the *ac etiam* in the *capias* was for assaulting and having criminal conversation with the plaintiff's wife.

E. YERKS, *defendant's counsel.*

YERKS & BAILEY, *defendant's attorneys.*

WM. NELSON, *plaintiff's counsel and attorney.*

BRONSON, Chief Justice. The defendant made a mistake in the original action, by putting in bail in a plea of trespass *on the case*, when it should have been *trespass*. After receiving notice of bail, and without advising the defendant of [\*248] his error, the plaintiff took an assignment of \*the bail bond, and commenced this action. This was pretty sharp practice; but still, I think the defendant must pay the costs in the bail bond suit on setting aside the pro-

Wintfield agt. Judges of Steuben Common Pleas.

ceedings in that action. No costs will be given on this motion. *Ordered*, that all of the plaintiff's proceedings in this suit be set aside, on defendant's paying the costs of the same, and putting in and perfecting bail in the original action.

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**The People, *ex rel.* EVI WINTFIELD, agt. THE JUDGES OF  
THE COURT OF COMMON PLEAS OF STEUBEN COUNTY.**

It is questionable whether a court of common pleas can acquire jurisdiction of an appeal cause from a justice's court, where the appeal bond served on the justice is defective.

The court of common pleas cannot *compel a return* by the justice, where there is a defective appeal bond served on him.

*September Term, 1846.*

MOTION by and on behalf of William S. Mulhollon, Esq., a justice of the peace of the county of Steuben, for a writ of prohibition to be directed to the judges of the court of common pleas of Steuben county.

It appeared that an order was entered in the book of common rules of the court of common pleas of Steuben county, on the 22d May, 1846, in a cause entitled "Jesse S. Bronson, appellant, ads. Eva Winfield, appellee." "On filing affidavit and proof of due service of appeal papers on Wm. S. Mulhollon, Esq., a justice of peace in above entitled cause, on motion of R. B. Van Valkenburgh, appellant's attorney, ordered that said Wm. S. Mulhollon make and file a return in this cause within ten days after notice of this rule, or show cause to this court, on the first day of the next term thereof, why an attachment should not issue against him." At the June term, 1846, of the Steuben common pleas, Mulhollon, the justice, appeared by his counsel to show cause against granting the attachment. Jesse S. Bronson also appeared by counsel to enforce the order against the justice. On the hearing of the matter, Mulhollon produced an affidavit made by himself; and his counsel stated the contents thereof to the

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Wintfield agt. Judges of Steuben Common Pleas.

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court, and objected to the court entertaining the motion or making any rule or order against him, on the ground that no copy of any affidavit in the matter had been served on him. The court decided that it was not necessary to serve any copy of affidavit, and that the counsel for Bronson might produce and use the original affidavit filed at the time of entering [\*249] the rule, which affidavit (after objection that it was not entitled and the objection overruled) the counsel for Bronson produced and read; and the court decided that the affidavit was sufficient, and the justice must show cause. The counsel for the justice then produced and read an affidavit made by the justice, which stated, that on the 17th of October, 1845, Bronson served upon the justice appeal papers in the cause of Jesse S. Bronson, appellant, ads. Eva Winfield, appellee. After examination of the papers, the justice supposed they were defective, and for that reason did not make return thereto; the supposed defects were, that the affidavit purported to set forth the proceedings in a suit in which one *Eva Winfield* was plaintiff and Jesse L. Bronson was defendant, and that a judgment was rendered against the defendant for forty dollars and twenty-four cents damages and *six dollars and three cents costs*. Whereas, the plaintiff was known by the name of *Evi Wintfield* and not "Eva Winfield," and the name was so entered and so appeared on the docket of the judgment, nor was the judgment rendered for "six dollars and three cents costs," but for *five dollars costs* and no more; that the affidavit served had no allowance of appeal indorsed upon it, but that the bond attached to it by a pin (and not otherwise) had an allowance of appeal indorsed thereon, and the affidavit alleged, as reasons why the attachment should not issue, that the bond did not state truly the names of the parties to the suit, that it did not set forth the true amount of the judgment, and that no allowance of appeal was indorsed on the affidavit served on the justice. The matter was then argued before the court of common pleas, who decided that the facts shown by the justice for cause were not sufficient to prevent a return by the justice, and that a justice of the peace had no right,



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Van Rensselaer agt. Saunders.

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when papers were served on him in a case of appeal, to undertake to decide whether or not they were in conformity with the statute, but must make his return to the court, and they could permit them to be amended, if defective. A true copy of the bond was annexed to the moving papers, which stated the plaintiff's name to be "Eva Winfield" throughout, and recited the amount of the judgment "forty-six dollars and twenty-seven cents."

W. BARNES, *counsel for motion.*

BARNES & MCCALL, *attorneys for motion.*

A. TABOR, *counsel opposed.*

R. B. VAN VALKENBURGH, *attorney opposed.*

BRONSON, Chief Justice. It is questionable whether the court of common pleas has acquired or can acquire jurisdiction until the bond is amended. Motion granted.

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\*STEPHEN VAN RENSSELAER *et al.*, executors, &c. [\*250]  
agt. CHARLES SAUNDERS.

Oyer can only be demanded where a deed is pleaded with profert. The remedy for want of profert, where it should be made, is a demurrer.

Where defendant moved for judgment of *non pros*, on the ground that the plaintiffs had not delivered oyer of the sealed indentures, on which they declared, pursuant to demand by defendant; but defendant did not show that the plaintiffs made profert of the indentures in the declaration; *held*, that the court could not presume profert, because it might have been omitted, either improperly or upon a sufficient excuse; and besides, it is a general rule, that the party who moves must make out a *prima facie* case before his adversary is bound to answer.

*September Term, 1846.*

MOTION by defendant for judgment of *non pros*.

The defendant moved for judgment of *non pros*, on the ground that the plaintiffs had not delivered oyer of the sealed indentures on which they declared, pursuant to a demand by the defendant. The affidavit stated that the declaration was

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Stephens agt. Jackson.

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upon sealed indentures, and that oyer was long since demanded; but it was not stated that the plaintiffs made profert of the indentures in the declaration. Plaintiffs' counsel said, that was a fatal objection to the motion.

S. STEVENS, *defendant's counsel.*

DAVIS, W. & DAVIS, *defendant's attorneys.*

P. CAGGER, *plaintiffs' counsel.*

R. CHRISTIE, JR., *plaintiffs' attorney.*

BRONSON, Chief Justice. Without showing that the plaintiffs made profert of the indentures, there is no foundation for the motion; for oyer can only be demanded when a deed is pleaded with profert. The remedy for want of profert, where it should be made, is a demurrer. We cannot presume profert, because it may have been omitted, either improperly or upon a sufficient excuse; and it is, moreover, a general rule, that the party who moves must make out a *prima facie* case before his adversary is bound to answer. Motion denied.

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DEWITT C. STEPHENS agt. GEORGE JACKSON and ROBERT ROBBINS.

Where a declaration contains two *special* counts and two common money counts, it is questionable whether it is strictly regular for defendant to procure an order for a general bill of particulars to the whole cause of action. There is no ground for a bill so far as the special counts are concerned. (*See the authorities cited in the case.*)

*It seems*, that in such a case the order should require the bill of particulars as to the common counts only.

*September Term, 1846.*

MOTION by defendants for judgment of *non pros.*

Defendants' papers showed that an alterative and peremptory order had been obtained and served on plaintiff's  
[\*251] attorney, requiring the plaintiff to furnish the attorney for the defendants with an account in writing of

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Niblock agt. Wright.

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the particulars of his demand, for which this action was brought; and that no bill of particulars had been furnished pursuant to such orders.

Plaintiff's papers showed that the declaration in this cause contained four counts; two special counts, for the nondelivery, by the defendants to the plaintiff, of a quantity of soda ash, and two common money counts. It was stated, that the plaintiff did not expect to introduce any evidence under the common counts; and supposed the orders for bill of particulars were inoperative as to the special counts; did not furnish any bill under either of the orders. Plaintiff's attorney stated that it was his opinion that the orders for bill of particulars served were inoperative and void for embracing the special counts, those counts being themselves the bill of particulars. (*Gra. Pr. 2d ed.* 511; *Chit. Arch'*. 875; 4 *Cow.* 200; 19 *Wend.* 122.)

D. WRIGHT, *defendants' counsel.*

ALFRED G. JONES, *defendants' attorney.*

T. JENKINS, *plaintiff's counsel and attorney.*

BRONSON, Chief Justice. It is questionable whether the defendants have been strictly regular. There was no ground for a bill of particulars, so far as two special counts are concerned. But, without settling any point of practice, I will make an order which will answer the purpose of both parties, as the plaintiff admits that he has no evidence under the common counts. *Ordered*, that the common counts be stricken out of plaintiff's declaration.

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ROBERT NIBLOCK agt. HENRY WRIGHT.

Omitting to entitle a declaration of a "particular term" of the court is an irregularity, for which a special motion is the only remedy. (12 *Wend.* 293; 9 *id.* 263.) Where it appears from the body of the declaration *that the suit was commenced before the cause of action arose*, this objection cannot be raised on demurrer, where there is no term mentioned in the title of the declaration.

*September Term, 1846.*

MOTION by defendant to set aside declaration, for irregularity.

The motion was made on two grounds, to wit: that the declaration was not *entitled of any term* of this court. Also, that the declaration alleged a cause of action accruing *subsequent* to the time when the suit was commenced by the writ of replevin. The action was replevin in the *detinet*; the entitling of the declaration was as follows: "Of the term of in the year of our Lord one thousand eight hundred and forty-six." It should have been entitled of May term, 1846. The defendant was, on the 11th of April, 1846, summoned to [\*252] answer, &c., and on the same day the goods \*and chattels were replevied from defendant. Plaintiff's declaration complained "that the said defendant *on the first day of July, one thousand eight hundred and forty-six*, at the city of Albany, in the county of aforesaid, received from one Lucas Willson a certain sloop or vessel, known as the *Star*, with her tackle, apparel and furniture, the property of him, the said plaintiff," &c. (the property replevied)

R. H. NORTHROP, *defendant's counsel.*

HOWES & NORTHROP, *defendant's attorneys.*

P. CAGGER, *plaintiff's counsel and attorney.*

Plaintiff's counsel insisted that the irregularity complained of—that the cause of action was laid in the body of the declaration after the suit was in fact commenced—should be taken advantage of by demurrer. (1st Paine & Duer Pr. 422; 2 Saund. 1 n 1; 10 John. 219.) The defendant could not be prejudiced by the omission of the "term." The time when the writ was issued might be proved. (1 P. & D. Pr. 423; 10 John. 219.) It might be otherwise, if the declaration was entitled of a term *subsequent* to that in which the writ was returnable. (12 Wend. 298.)

BRONSON, Chief Justice. If the declaration had been properly entitled the defendant might have demurred, because the

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Kanouze agt. Martin.

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suit was commenced before the cause of action arose; but as no term was mentioned, the defendant could not raise the question on demurrer. Omitting to entitle was an irregularity for which this motion was the only remedy. (12 *Wend.* 293; 9 *id.* 263.) *Motion granted with costs.*

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CORNELIUS KANOUSE, pl'ff in error, agt. JOHN M. MARTIN,  
def't in error.

It is irregular, to return to a writ of error *interlocutory proceedings* had in the court below with the judgment record. If interlocutory proceedings are wanted, by plaintiff in error, to be brought up for the purpose of showing jurisdiction in the court below, or for any other purpose, he should allege diminution and send a certiorari.

An assignment of errors, alleging special causes of error, founded on such interlocutory proceedings is also irregular, and must fall with the return.

Where such interlocutory proceedings are returned, at the request of the plaintiff in error, or his attorney, and error assigned thereon, they will be struck out *with costs*. The judgment record will stand as the proper return, and plaintiff in error may have liberty to assign errors anew.

*September Term, 1846.*

MOTION by defendant in error to strike out a special assignment of errors contained in a general assignment of errors in the cause, and a part of the return made to the writ of error therein.

It appeared on the part of the plaintiff in error in this cause, that the defendant in error commenced, \*by declaration, an action of assumpsit in the court [\*253] of common pleas of the city and county of New York, against Kanouze, plaintiff in error. The declaration contained four counts, in each of which the plaintiff's demand was stated to be one thousand dollars, and the damages were laid at the sum of one thousand dollars; there was no bill of particulars, notice, or other writing accompanying it, limiting or reducing the plaintiff's demand to a sum less than one thousand dollars. The plaintiff below being a citizen of this state, and the defendant below a citizen of New-Jersey, the

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Kanouse agt. Martin.

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latter, at the time of entering his appearance, duly filed a petition for the removal of the cause to the circuit court of the United States for the southern district of New-York. After the presentation of the petition, the court below received an affidavit from the plaintiff, stating the amount of his claim to be four hundred and ninety-nine dollars and fifty cents only; and thereupon refused to make an order for the removal of the cause, and subsequently permitted the plaintiff to file an amended declaration, in which his claim was reduced to four hundred and ninety-nine dollars. The defendant below, being advised that, by the presentation of the petition, the jurisdiction of the court below was taken away, and that all subsequent proceedings therein were *coram non judice* and void, suffered judgment to be taken against him by default. On the first day of the session of the United States circuit court next after the presentation of the petition, the defendant below entered his appearance in the circuit court in the cause, and subsequently ruled the plaintiff to declare. Thereupon, Martin, plaintiff in the court below, moved the circuit court to vacate the rule to declare, and for a perpetual stay of proceedings. After argument before Mr. Justice NELSON and Judge BETTS, the judges of the circuit court, they granted the motion (without costs) solely upon the ground that there was not on file any order of the court of common pleas for the removal of the cause; but, at the same time, expressed their opinion, that the court of common pleas erred in refusing to make such order, and had no right to proceed therein after the presentation of the petition.

On the part of the defendant in error, a copy of the writ of error was annexed to the moving papers, which was tested the 17th day of January, 1846, and returnable on the first Monday of May, 1846, and drawn in the usual form. A copy of the assignment of errors was also annexed. The special assignment of errors complained of, and which was included in the general assignment, read as follows: "There is also error in this, to wit, that by the record aforesaid it appears [\*254] that the judgment aforesaid, \*in form aforesaid

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Kanouse agt. Martin.

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given, was given for the said John M. Martin against the said Cornelius Kanouse, whereas, by the laws of the land, the said cause ought to have been removed to the said circuit court of the United States for the southern district of New-York, and the said court of common pleas had no jurisdiction thereof at the time of giving of the said judgment." It was shown by defendant in error that the return to the writ of error in this cause contained, in addition to the judgment record, a copy of the original declaration in the suit in the court of common pleas, the proceedings to remove the cause from the court of common pleas to the United States circuit court, and the proceedings on a motion for leave to amend the plaintiff's declaration in the court of common pleas. It was stated that the additional matters were returned by the clerk of the court of common pleas, at the special instance and request of Andrew S. Garr, Esq., the attorney for Kanouse in the common pleas, and counsel for him in the writ of error. Had not such request been made by Garr, the clerk stated that he should have only returned to the writ the judgment record, as in ordinary cases, no bill of exceptions having been filed.

An objection was made by defendant in error to allow the plaintiff in error an amendment of the assignment of errors, to bring up interlocutory proceedings to show a want of jurisdiction in the court of common pleas after the filing of the petition to remove the cause; because, the papers on this motion showed the non-residence of the attorney (A. S. Garr) of the defendant below, and a consequent inability to appear in the state court, pursuant to the act of the United States, so as to entitle him to remove the cause. The defendant in error showed by the affidavit of Peter Bently, Esq., an attorney and counselor of the supreme court of the state of New-Jersey, that Bently was well acquainted with Andrew S. Garr, Esq., who was also a practicing attorney of the supreme court of the state of New-Jersey, and had a family with whom he then resided, and for many years (then) last past had resided as a permanent resident in and inhabitant of Jersey City, in the state of New-Jersey, and as such inhabitant had been in the habit of voting

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Kanouse agt. Martin.

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in that city and at state elections of public officers, for such officers, and that to enable said Garr to vote legally, it was necessary that he should have been an inhabitant of that state at least one year prior to giving any vote for any state or county officers, and that to enable said Garr to practice as an attorney of record in the supreme court of New-Jersey, it was also made necessary, by a rule of that court, that he should be an actual resident in the state of New-Jersey. The affidavit [\*255] \*of Martin, the defendant in error, corroborated the fact of the residence of A. S. Garr in Jersey City, state of New-Jersey; and that after the issuing of the writ of error in this cause, and the filing of the return thereto, Martin made a motion in the court of common pleas, to take from the files of that court sundry of the papers filed there by Garr as attorney; copies of which were annexed to the return, on the ground, amongst others, that Garr was not an attorney of the court in which he had filed them. The motion was denied by the court of common pleas (as it was understood), chiefly on the ground that the motion was made after the proceeding had been removed into this court by writ of error. In answer to the residence of Garr, the affidavit of Andrew S. Garr stated that he had been more than thirty years, and was then a practicing attorney and counselor of this court, in which he was duly admitted, and of nearly all the other courts in the city of New-York, and had never been removed or suspended. He had for many years rented and occupied, and continued to rent and occupy a tenement in the city of New-York, and had been and was in the constant practice of spending the business hours of every day in the week in the city of New-York, and of dining there. In the year 1833, he took a house in Jersey City, in the state of New-Jersey, where his family has ever since resided; that in so doing he never intended to relinquish his professional business or residence in the city of New-York, but on the contrary to continue the same. That from the first moment of his occupying the house in Jersey City, his usual practice had been to go from thence early in the morning to his office in the city of New-York, in which



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he kept his law library and papers, and to remain in the city of New-York, exercising his profession as such attorney and counselor, until a late hour in the afternoon; that during the hours of business he was rarely absent from his office, except when at the City Hall, or elsewhere in the city on business; that his name, profession, and place of business in the city of New-York were, and for many years last past had been, regularly published in the New-York city directory; that letters to him were usually directed to the city of New-York, and came to him through the post-office thereof, at which he had a box, and that he had no office or place of business out of the city of New-York. That although, during the last thirteen years, it had been generally known by the members of the bar in the city of New-York that his dwelling house was in Jersey City, his right to continue to practice as an attorney of the courts of this state had never been questioned, except by the defendant in error, and was not questioned by him in the court below, until after he had \*obtained the judgment which [\*256] the plaintiff in error seeks to reverse; and that during all the proceedings in that court, in the original action, it was well known, both to the plaintiff below, and to H. C. Westervelt, Esq., his attorney in the cause, that his (Garr's) dwelling house was in Jersey City, notwithstanding which they recognized and treated him as attorney for the defendant, and served on him, as attorney, the papers and notices in the cause. The following authorities were cited on this point: 5 Ves. 786, 789; 19 Wend. 11; 1 Dodson, 21; 1 Phillips on Ins. (1st edit.) 25; 2 Kent's Com'ts, 430, note (a) appendix to 1 Wheaton, 26, 27, 28.

J. M. MARTIN, *counsel in propria persona.*

H. SCOVIL, *attorney for defendant in error.*

G. R. BOWDOIN, *counsel for plaintiff in error.*

J. WALLIS, *attorney for plaintiff in error.*

BRONSON, Chief Justice. Nothing has been properly returned in answer to the writ of error, but the judgment record

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Daget agt. Hoeffele.

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in the court below. If the plaintiff in error wanted the other matters brought up, he should have alleged diminution and sent a certiorari. All beyond the judgment record must be struck out; and as the improper return was made upon the suggestion of the counsel for the plaintiff in error, costs of the motion should be allowed. The assignment of errors is founded upon the irregular return, and must fall with it.

*Ordered*, that the return made to the writ of error by the court below be corrected by striking out of it every thing but the judgment record, and that the assignment of errors be set aside with ten dollars costs of the motion, to be paid by the plaintiff in error, who is at liberty to assign errors anew.

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JOHN F. H. DAGET, plaintiff in error, agt. THE COMMISSIONERS OF THE ALMS HOUSE and BRIDEWELL of the city of New-York, *ex rel.* MARGARET HOEFFELE, defendant in error.

A common law certiorari cannot be allowed by a circuit judge, or any judge at chambers. (*See ante*, p. 136; 5 *Wend.* 98; 6 *id.* 564; 9 *id.* 433.)

*September Term, 1846.*

MOTION by defendants in error to quash a certiorari.

This was a case of appeal from an order of filiation made by Garrit Gilbert and Robert Taylor, Esqs., special justices of the peace, &c., in the city of New-York, to the judges of the court of general sessions of the peace, in and for the city and county of New-York. This cause was tried on the 17th of February, 1844, and the court affirmed the order of filiation in all respects.

On the 10th of February, 1844, W. KENT, Esq., circuit judge of the first circuit, allowed a common law certiorari to remove the proceedings \*into this court. [\*257] The return to the writ contained an affidavit of the attorney for plaintiff in error, giving the testimony, &c., in the case, and the original order of filiation and the writ of certiorari.

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Campbell agt. Clark.

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G. R. J. BOWDOIN, *defendant's counsel.*WM. W. CAMPBELL, *defendant's attorney.*A. TABER, *plaintiff's counsel.*F. H. B. BRYAN, *plaintiff's attorney.*

Defendant's counsel insisted that a common law certiorari could be allowed, only by the court on cause shown. (5 *Wend.* 98; 6 *Wend.* 564; 9 *id.* 483; 2 *Howard*, 136.) Also, that no papers or record, showing that the general sessions obtained jurisdiction by appeal and made any decision therein, had been returned in this case. The affidavit of the attorney was no part of the return, and until a final decision or judgment, a certiorari could not be allowed. (2 *R. S.* 390.)

BRONSON, Chief Justice. A common law certiorari cannot be allowed by a judge at chambers; and, besides, the writ in the present instance brings up no question which can be reviewed in this form of proceeding. *Ordered*, that the writ of certiorari allowed by the circuit judge of the first circuit in this cause be and the same is hereby quashed.

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JOHN A. CAMPBELL, plaintiff in error, agt. EDWARD M. CLARK  
and ROBERT C. CLARK, defendants in error.

The service of an order staying further proceedings upon an execution, granted by a commissioner upon the allowance of a writ of error, does not operate as a *supersedeas* to discharge from custody a defendant who was arrested before the service of the order. (21 *Wend.* 287.)

After the service of such order on the sheriff only, and he suffers the defendant to escape, the plaintiff is at liberty to issue a new execution. (4 *Cow.* 553; 6 *id.* 465.)

A writ of error and order to stay does not stay the issuing of a second or alias execution in such a case, unless the order to stay has been served on the attorney who issued the execution. (2 *R. S.* 599, § 30.)

*September Term, 1846.*

MOTION by plaintiff in error to set aside an alias *ca. sa.*, issued against him.

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Campbell agt. Clark.

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The action in this cause was trespass. The attorneys for defendants in error entered up judgment against the plaintiff in error, June 12, 1846, and on the 15th of June, 1846, issued a *ca. sa.* against plaintiff in error, to the sheriff of Niagara county, on which the plaintiff in error was arrested the same day; after the arrest, and on the same day, a writ of error to this court, from the court of errors in this cause, tested the 9th day of June, 1846, with an endorsement of allowance thereon, as follows: "I allow the within writ of error, and a proper bond, as required by law, having been executed and exhibited to me, I hereby order that the issuing [\*258] \*of an execution on the judgment, in said writ mentioned, be stayed, if none has been issued; and if an execution has been issued thereon, that all proceedings thereon be stayed until the judgment of the court shall be rendered on this writ of error. June 15, 1846. (Signed) L. H. Nicholls, Supreme Court Commissioner, Niagara county," was exhibited to the sheriff; and the attorney for plaintiff in error requested the sheriff to show it to the attorneys for defendants in error, and get their consent to have Campbell (plaintiff in error) discharged. After the sheriff had shown the writ, &c., to the attorneys for defendants in error, they declined to consent to the discharge of Campbell. The attorney for Campbell then served a notice on the sheriff of the bringing of the writ of error, order, &c., and the sheriff immediately thereafter, on the same day, discharged Campbell from arrest, and made his return on the *ca. sa.* that he had so discharged him, and filed the *ca. sa.* and return in the clerk's office. On the 22d of June, the attorneys for defendants in error, hearing no more from the writ of error, and not having been served with any notice of the issuing of the writ, nor of bail in error or order staying execution, and the writ not having been filed with the clerk, issued an *alias ca. sa.*, on which Campbell was the same day arrested by the sheriff. After the last arrest, Campbell's attorney served on the attorneys for defendants in error a *notice* that a writ of error had been allowed, and that a supreme court commissioner had granted an order staying execution.

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Thompson agt. Valarino.

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That was all the proceedings had on the writ of error. It did not appear that the writ had ever been served upon or filed with the clerk of this court, nor had any notice of bail in error been served, nor had the order staying execution been in any manner served.

The attorney for plaintiff in error insisted that the sheriff, on being served with the order to stay proceedings, &c., could proceed no further with the first *ca. sa.* Nor could another execution afterwards issue. (2 *R. S.* 494, 5, § 29, 30.) That notice on the sheriff was sufficient. (3 *Hill*, 478, 4.)

C. STEVENS, *plaintiff's counsel.*

G. D. LA MONT, *plaintiff's attorney.*

M. T. REYNOLDS, *defendants' counsel.*

WOODS & BOWEN, *defendants' attorneys.*

BRONSON, Chief Justice. The writ of error and order to stay proceedings did not supersede the *capias ad satisfaciendum* on which the plaintiff had been previously arrested. (21 *Wend.* 287.) And the sheriff having suffered the plaintiff to escape, the defendants were at liberty to issue a new execution, as they did on the 22d of June. (4 *Cow.* 553; 6 *id.* 465.) The writ of error and order to stay did not stay the issuing \*of the second or *alias ca. sa.*, because the [\*259] order had not been served on the defendants' attorneys. It has not been so served to this day. (2 *R. S.* 597, § 30.) The sheriff did not detain the plaintiff on the jail limits under the first *ca. sa.*; but discharged him out of custody, and the writ was returned. The proceedings of the defendants seem to have been regular in all respects. *Motion denied, with \$7 costs of opposing.*

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WILLIAM D. THOMPSON, plaintiff in error agt. AUGUSTIN VALARINO, defendant in error.

Where one of two defendants, in a judgment, brought a writ of error thereon, and it appeared, before the issuing of the writ, that the other defendant

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 Thompson agt. Valarino.
 

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was requested by his co-defendant to join in the writ, which he declined to do; and a motion was made by defendant in error to quash the writ, and an order was entered on the decision of the motion, that the defendant who declined to join appear in this court at the next special term, and join in the writ of error and proceedings in the cause, or be forever precluded from bringing any writ of error on the judgment; and at the time appointed, the defendant in error produced proof of the due service of a copy of such order on the defendant, who refused to join, and on the attorneys for plaintiff in error; and the defendant not having joined in the writ, an order was thereupon entered, that the defendant's default be entered (which would preclude him from bringing any writ of error on the judgment), *and that the costs of the motion be paid by the plaintiff in error.* (2 R. S. 593, § 14.)

*September Term, 1846.*

MOTION by defendant in error that one Sidney Mason appear and join in the writ of error in this cause, and in the proceedings therein, and pay the costs of the motion and proceedings; and, in case of his non-appearance, that his default be entered, &c.

At the last June special term the defendant in error made a motion to quash the writ of error, &c., in this cause, for irregularity, on papers which showed that the writ of error in the cause was prosecuted out of this court by the plaintiff in error, who was one of the defendants in the court below, for the purpose of removing into this court the record and proceedings in a judgment recovered in the superior court of the city of New-York, by the defendant in error, against the plaintiff in error and Sidney Mason as co-partners, in an action of assumpsit for \$4069.26 damages and costs, on the 25th day of October, 1845. The writ of error was tested on the third Monday of October, 1845, and returnable on the first Monday of January, 1846. The suit in the superior court was brought against Sidney D. Mason and William D. Thompson as co-partners. The *capias* was served on Thompson only and not on Mason, as it was alleged that Mason, at the time of the issuing and return of the *capias*, and for a long [\*260] time subsequent, was beyond seas and out of the jurisdiction of the court. Thompson appeared and defended the suit, and judgment was entered up against both defendants. The writ of error was sued out in the name of

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Thompson agt. Valarino.

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Thompson alone impleaded with Mason as plaintiff in error. It was alleged, that at the time the writ was issued, Mason was in full life, within the state, and not incapable, from insanity or otherwise, of joining in the writ; and that Mason had never been made a party to the writ of error. The bond given on the allowance of the writ of error was executed by Thompson as principal with Mason, his co-defendant in the court below, and another person, as sureties; and the usual order granted staying proceedings on execution, &c. Defendant in error served notice of exceptions to the sufficiency of the sureties in the bond, without waiving any other objection which he was entitled to take against the bond or either of the sureties, and also claimed and insisted that Sidney Mason was not competent bail in error, to stay the issuing of execution, or to authorize the allowance of the writ of error. The sureties subsequently justified by affidavit, which was filed. The writ of error was returned and filed on the 11th of April last. On the 6th of May the plaintiff in error filed and served his assignment of errors; the only error assigned being error in fact, namely, that at the time of the commencement of the suit upon which the judgment was rendered, he was and ever since had continued to be and then was consul of the Republic of Ecuador, for the port of New-York, and not liable to be sued in the state courts. That no leave was ever applied for or obtained from this court, by or on behalf of the plaintiff in error, to the issuing of the writ of error or to the assignment of such error in fact; that the contract on which the judgment was rendered was made by the plaintiff in error jointly with Sidney Mason, as partner of the commercial firm of Mason & Thompson, as appeared by the return to the writ of error; and that Sidney Mason was not, at the time of the commencement of this suit in the court below, nor had he been at any time since, a consul or vice consul, or liable to be sued by the defendant in error in any district court of the United States.

On the part of the plaintiff in error, it appeared that, before the issuing of the writ of error, his attorneys made applica-

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Thompson agt. Valarino.

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tion, in writing and verbally, to Mason, to join in the writ of error in this cause, which he declined to do, stating that he considered the whole of the business with Valarino an affair of Mr. Thompson's, and he desired to have nothing to do with it; but, if Thompson desired it, he would become one of his sureties on bringing the writ. Thompson's affidavit [\*261] stated that Mason left New-York \*upon a journey to Virginia, one day before the *capias* was served in the cause in the court below, and denied that he was beyond seas at the time of the commencement of the suit, or had been at any time since; that he returned about two weeks after he left for Virginia.

Upon these facts, Mr. Justice JEWETT, at the June special term, made an order as follows: "Ordered, that Sidney Mason appear in this court on the first day of the next special term thereof, and then join in the writ of error and the proceedings of this cause, or be forever precluded from bringing another writ of error on the judgment in said cause; and in the mean time all further proceedings on such writ to be stayed."

The attorney for defendant in error served on Sidney Mason, and on the attorneys for plaintiff in error, a copy of the order and notice of this motion on the 20th of July last, and gave notice that the papers upon which the order was founded, as well as the order itself, would be used on this motion.

A. TABER, *defendant's counsel.*

FRANCIS GRIFFIN, *defendant's attorney.*

G. R. J. BOWDOIN, *plaintiff's counsel.*

EMERSON & PRICHARD, *plaintiff's attorneys.*

BRONSON, Chief Justice. Mason having neglected to appear and join in the writ of error, his default must be entered, which will preclude him from bringing any writ of error on the judgment. The only remaining question, which can at this time be considered, is, that of the costs of the motion, which should, I think, be paid by the plaintiff in error. (2 R. S. 593, § 14.)



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Jenkins agt. Williams.

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(*Order.*) Sidney Mason having neglected to appear and join in the writ of error in this cause, pursuant to a rule of this court, with which he has been duly served, *Ordered*, that his default be entered, and that he be forever precluded from bringing any writ of error on the judgment in this cause. And it is farther *ordered* that the plaintiff in error pay to the defendant in error ten dollars costs of the motion to quash the writ of error; and, in default of such payment, that the writ of error be quashed.

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JOSIAH WHIPPLE JENKINS agt. JOSEPH L. WILLIAMS.

As between attorney or solicitor and client, the client has a right to have his bill of costs *taxed*; and although he may have made a formal settlement with his attorney or solicitor, and have confessed judgment for the amount of the costs as made out (without taxation) by his attorney or solicitor, yet, if the client is subsequently dissatisfied and demands a *taxed* bill, it is proper that the bill should be *taxed*. The client is not competent to determine how much ought to be allowed as *taxable* costs.

\*It is different, however, with *counsel fees*, there the client is competent [\*262] to judge for himself what are proper allowances, and if he settles and agrees with his counsel on the amount, with a full knowledge of all the facts, he will be bound by it, and the court will not interfere.

*September Term, 1846.*

MOTION by defendant for a perpetual stay of execution, and that the judgment in this cause be set aside or satisfied.

About the first of August, 1844, the defendant retained the plaintiff, as solicitor and counselor in chancery, to appear for him in a chancery suit. The suit was commenced in the month of July, 1844, by Jane Williams (the wife of defendant), by Marcus Holmes, her next friend, by filing a bill of complaint against the defendant before the vice-chancellor of the fifth circuit, to obtain a separation from bed and board forever between her and the defendant, and for alimony. Defendant's appearance was entered on the 6th of August, 1844. On the 23d day of September, 1844, the defendant's answer

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Jenkins agt. Williams.

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to the bill of complaint was filed and served. The defence set up in the answer was adultery by the complainant. The cause was decided by the vice-chancellor on or about the 4th of October, 1845, against the defendant. It appeared that Thomas H. Flandrau, Esq., was employed as associate counsel for defendant, and assisted in the management and argument of the cause. From the papers on this motion, which were very voluminous on both sides, it appeared that the chancery suit was of great importance, and was severely litigated by both parties. Flandrau stated in his affidavit, that the examination of witnesses commenced about the 3d of December, 1844, and ended about the last of May, 1845. During that period he attended most of the examinations as assistant counsel with Jenkins, and that the examinations, according to his recollection, actually occupied over two months; that about 120 witnesses were examined, whose testimony amounted to about 300 folios in length. The decree against the defendant, as first ordered in the cause, was for a yearly allowance to the complainant of \$600 with costs, but was afterwards reduced to \$400 per year and the costs, subject to certain specific qualifications.

The defendant, Williams, stated in his affidavit on this motion, that the plaintiff, Jenkins, on or about the 20th of October, 1845, informed him that a writ of *ne exeat* was issued against him in the chancery cause, and he would be arrested by virtue thereof unless he immediately left the state, which Jenkins advised him to do, and which information he believed to be true, and acted accordingly; and that under the excitement of the occasion he was persuaded by Jenkins to give a bond and warrant of attorney to enter judgment [\*263] upon, in favor of Jenkins against him in the \*penalty of \$1640.52, conditioned to pay \$820.26; as well to secure the costs in the chancery suit as on a settlement thereafter to be made between him and Jenkins, should there be found anything due and unpaid, as also to place his personal property out of the reach of the complainant, and for no other purpose; and that he was also persuaded to give to Thomas

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 Jenkins agt. Williams.
 

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H. Flandrau a bond and warranty of attorney in the penalty of \$1000, conditioned to pay \$500 for a similar purpose.

It further appeared, from the affidavit of Williams, that he left this state about the 20th October, 1845, and was absent about six months, during which time the chancery suit was settled, and on his return he requested a settlement with Jenkins, in regard to the costs in the chancery suit; that Jenkins at first put him off because he was not ready, and afterwards claimed that they had settled all of that matter. Williams then requested a taxed bill of costs, which Jenkins refused to give him.

Williams stated, that he had paid, or caused to be paid, the following charges in the chancery suit, viz. :

To complainant's solicitor by order of court,	\$75 00
“ do do do do for alimony,	325 00
“ complainant's solicitor, \$5 per week, 61 weeks,	305 00
“ complainant's solicitor on the settlement of the suit,	2324 00
“ the plaintiff (Jenkins) for his costs, &c.,	1027 48
“ expenses on commissions,	2 00
“ Joseph D. Husbands, examiner,	24 00
“ Huet R. Root, examiner,	600 00
“ Thomas H. Flandrau as counsel,	520 00
“ expenses of commissions to Missouri,	10 00

That, of the sum of \$1027.48 paid plaintiff (Jenkins) as above stated, \$400 was paid by a bill of lumbur which he let Jenkins have during the years of 1844 and 1845; \$100 Williams's check, which Jenkins received the money on, \$281.23 was received by Jenkins on the sale of Williams' personal property, which was sold on Jenkins' and Flandrau's executions after Williams left the state (and \$285 was received by Flandrau on his executions out of the avails of the same sale); the remainder was stated to have been paid in small sums at different times (giving the amounts and manner of payment), during the progress of the chancery suit; and all to be applied towards Jenkins's costs in the suit; that Jenkins claimed as due him on the execution in this cause \$551.64 and inte-

rest. Williams stated that he was a farmer, and never before this suit had any suit in chancery, and was wholly [\*264] ignorant of what the legal and proper charges \*were or should be for such services; that he never had been furnished with any bill of items of the costs and charges of his solicitor and counsel in the suit, but was informed and believed the amount claimed of him was unreasonable and excessive. Two affidavits of counselors of this court were produced by Williams, one of which stated that he had examined the proceedings in the chancery suit, and in his judgment the taxable fees on the part of solicitor for the defendant, exclusive of disbursements, would amount to about the sum of \$200, and the reasonable counsel fees in the cause would be \$300. The other stated that he was well acquainted with all the proceedings in the cause, and in his judgment the taxable fees of the solicitor for defendant would amount to about the sum of \$300, and that the reasonable counsel fees on the part of the defendant would be \$500.

On the part of Jenkins, in opposition to this motion, it appeared by the affidavit of Samuel Baldwin, Esq., that he had been attorney and solicitor for six years, and for three years past counselor in this court, and counselor in chancery; that he was employed in Jenkins's office from the 3d of December, 1844, to the 2d of April, 1846, and during most of the progress of the chancery suit between Williams and his wife. That Ralph McIntosh was a student at law in Jenkins's office during the time. That Williams (the defendant) lived about three miles from Jenkins's office; when Baldwin entered the office, and down to the time when the cause was argued, in the month of August, 1845, Williams was at Jenkins's office a large portion of his time in reference to the cause; he (Baldwin) was engaged a number of days in taking testimony for Williams in the cause, and had a general knowledge of the proceedings therein, and had no doubt that Jenkins, McIntosh and himself were severally engaged in the cause, as much as one-half of the time during business hours, from the time he entered the office down to the argument of the cause; that

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Jenkins agt. Williams.

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during that time Jenkins was so much engaged in the cause, that other business requiring attention was necessarily turned off, neglected or delayed. That soon after the decision of the case was known, Williams stated to him, at Jenkins's office, that he was utterly unable to pay the amount decreed by the vice-chancellor, and that he was determined to arrange his business, and leave the state as soon as possible, and a short time afterwards stated the same thing in substance to Jenkins, at Jenkins's office, in his (Baldwin's) presence. That Jenkins replied, in substance, that it would be folly for him to think of removing from the state; and mentioned as a reason, the loss and inconvenience to him of hastily closing up his affairs, as his property \*was then situated, and after considera- [\*265] ble conversation between them, Williams repeated his determination of arranging his business and removing from the state, with the intention not to return, giving as a reason that he was utterly unable to pay the amount of the decree, and desired Jenkins to have his costs made out in the cause, that he might have a settlement with him and pay or secure him. That Jenkins soon afterwards directed Baldwin to make out a bill of costs in the cause, which was accordingly done; it occupying several days to do it, as it required much labor in the examination of entries and papers, and at that time Baldwin was a taxing officer of this court, and had done considerable of that kind of business. The bill was made out with much care, and did not contain any counsel fees or other fees not provided for by the fee bill, as he (Baldwin) believed. The amount of the bill, when finished, amounted to \$720.26. Soon after the bill was completed, Williams called at the office of Jenkins, and it being presented to him, it was examined, explained and conversed about between Williams and Jenkins, and it was believed to be well understood by Williams. It was then talked about, between Williams and Jenkins, as to what amount Jenkins ought to be allowed for counsel fees and services rendered in the cause, not included in the bill of costs; in which Jenkins, after contending for a larger sum and Williams against allowing it, finally agreed to take, and Williams

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Jenkins agt. Williams.

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agreed to allow the sum of \$500. That Jenkins had at that time spent considerable time and labor in arranging the business of Williams to enable him to remove from the state, and about some considerable other business connected with such removal, and the sale of his real estate, bank stock, and some other property then remaining to be sold, and the sum of \$100 was finally agreed upon between Williams and Jenkins for such service, as a proper remuneration to Jenkins. The amount of Williams's account, which was for lumber, timber, and money furnished Jenkins by Williams, was then examined and talked over, and ascertained, from the bills, memorandums and evidences thereof produced, to be, and which was mutually agreed upon between Jenkins and Williams, the sum of \$500. Baldwin then added together the sums agreed to be allowed Jenkins, and took therefrom the sum of \$500, the amount agreed to be allowed Williams, which left a balance due Jenkins of \$820.26, and which was then mutually agreed upon as the balance due from Williams to Jenkins. Baldwin stated that the settlement was made in a fair and considerate way and manner, and, as he believed, according to the true intention and understanding of Jenkins and Williams. Baldwin was then directed to draw up a bond and warrant of attorney to Jenkins for the entry of judgment for the balance found due to Jenkins, which were then duly executed and delivered by Williams, Baldwin being the subscribing witness. Baldwin stated that he had repeatedly heard Williams express his entire satisfaction with the manner of conducting and managing the suit by his counsel; and that, whatever might be the result of the litigation, he should be satisfied that everything had been done in his behalf that could be.

Jenkins's affidavit corroborated the facts of the settlement between him and Williams, as stated by Baldwin, and entered very minutely into all the proceedings had in the chancery suit. That since the settlement with Williams, he had received \$281.23, which was endorsed on the execution after the sale of Williams's personal property. Jenkins also stated how

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Jenkins agt. Williams.

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and in what manner he did dispose of all the money, &c., he had received of Williams from time to time, which went to make up the sum of \$1027.48 stated by Williams to have been paid on and towards his costs in the chancery suit; \$500 was allowed on the settlement as stated by Baldwin, \$281.23 received on the execution, and the remainder expended during the progress of the suit for disbursements in the suit, and for the benefit of Williams in carrying on the suit, giving particulars. Jenkins stated that, from the importance of the case, as well as the great anxiety of Williams on the subject, he was induced to attend to the suit in preference to any other business, and to bestow his time freely in search of evidence and ascertaining the evidence to be given; that he devoted his most unremitted attention and his best energies to the defence of the suit, and believed that \$500 was not an adequate compensation for his service in the cause, from its commencement to the decision of it by the vice-chancellor, over and above the services chargeable in a taxed bill of costs against his client. Jenkins stated that he did not know nor had he heard, on or about the 20th of October, 1845, that a writ of *ne exeat* had been issued against Williams, nor did he know that any such writ had been issued, until after Williams had left the state. That he never, in any manner whatever, at any time, advised Williams to leave this state, and denied that there was any agreement or understanding between him and Williams; that when Williams returned to this state, or at any other time, he and Williams would have a full and just settlement of their dealings, and ascertain how much, if anything, would be due him under the judgment, or anything of like effect; but upon the confession of the judgment by Williams, the settlement was full and final, and, as he had no doubt, was so understood by Williams. After the return of Williams to this state, \*he called on Jen- [\*267]kins and wanted to settle with him; Jenkins, supposing he wanted to pay the amount due on the judgment, directed his clerk to make out the amount, and soon afterwards a statement of it was handed to Williams, who, without making

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Jenkins agt. Williams.

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any objections or intimating that anything was wanting, took the statement away, and in a few days called on Jenkins and threatened him with a litigation in regard to the judgment, and demanded a taxed bill of costs in the chancery suit. Jenkins stated that, on perceiving the disposition of Williams to get up a litigation with him, he paid but little attention to his request for a bill of costs, although he would willingly have made out such bill for the satisfaction of Williams, had he called for it in a friendly manner. When Williams demanded the bill of costs (which was in June last), he for the first time claimed that he had never had any settlement with Jenkins.

Thomas H. Flandrau stated, that he was counsel with Jenkins in the chancery suit against Williams, and attended most of the examinations with Jenkins as assistant counsel, which actually occupied over two months; that, from his knowledge of the proceedings, he believed that, in preparing for the examinations and attending them, at least one half of Jenkins's time, during six months, was fully occupied; that he well knew the labor and services bestowed by Jenkins and his clerks in the chancery suit, and that over and above the taxable services, as between solicitor and client, he believed that \$500 would not be an adequate counsel fee to compensate Jenkins for his services in the cause. Flandrau stated that it was not true that he ever received from Williams the sum of \$520, as collected on his execution by the sheriff on the judgment against Williams, mentioned in Williams's affidavit; that the only amount received was \$285 in his favor.

Jenkins produced the affidavits of two other counselors, who were acquainted with the proceedings in the chancery suit, who severally stated that, in their opinion, \$500, over and above the taxable costs in the cause, was no more than a reasonable compensation to Jenkins for his services as counsel in the cause.

T. C. CLARK, *defendant's counsel.*

E. J. RICHARDSON, *defendant's attorney.*

S. STEVENS, *plaintiff's counsel.*

J. WHIPPLE JENKINS, *attorney in pro. per.*



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Stow agt. Smith.

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BRONSON, Chief Justice. As to the \$500 counsel fee in the chancery suit, and the \$100 for other business, the defendant was competent to judge for himself what were proper allowances; and having settled and agreed on the amounts, with a full knowledge of all the facts, there is no ground on which the court can refer it to the vice chancellor, or any one else, to say what were the proper sums to be paid for those services.

\*But, in relation to the sum which was allowed on [\*268] the settlement as for taxable costs, the case is different. The defendant was not competent to determine how much ought to be allowed. He undoubtedly acted upon the plaintiff's statement, that the charges made were taxable costs; and, without intending to intimate that there has been anything wrong on the part of the plaintiff, we think it proper that the bill should be taxed.

*Ordered*, that all proceedings on the judgment and execution in this cause be stayed, until the plaintiff shall have caused his bill of costs, as solicitor for the defendant in a suit brought against the defendant in the court of chancery, by his wife, Jane Williams, to be taxed, upon due notice to the defendant's attorney on this motion. And in case the bill shall be taxed at less than the sum of \$720.26, it is *further ordered*, that the difference be credited and allowed to the defendant on the judgment and execution in this cause.

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FREDERICK A. STOW agt. SIDNEY SMITH.

The same agt. CALEB WRIGHT.

Where plaintiff's attorney issued an execution with an incorrect indorsement on it and subsequently made the correction, by directions to the sheriff, before papers for a motion to set aside the execution had been *served*, although the motion papers were prepared before such correction; and it appeared, after the service of the papers on the plaintiff's attorney, he notified defendant's attorneys of the correction and requested the motion to be withdrawn, which was declined, unless defendant's costs were paid; *held*, that defendant was not entitled to costs of the motion.

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Stow agt. Smith.

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*September Term, 1846.*

MOTION by defendant to set aside an execution issued in the second cause, or to correct the indorsement on it according to statute.

It appeared that the plaintiff recovered judgment by default in both the above causes. In the first cause, on two promissory notes, signed by defendant, Smith, as maker, one of which was indorsed by the defendant, Wright, and the other indorsed by another person and not indorsed by Wright. And in the second cause, on the same promissory note, which was indorsed by Wright and made by Smith, against Wright, as indorser. Plaintiff's attorney issued executions to the sheriff, and indorsed on them to levy the full amount of the judgment in each cause.

Defendant's attorneys, on learning the fact, prepared the papers for this motion, on the 24th of August last, but which were not perfected until the 25th of August, which papers alleged that the amount of the note, and the same note upon which judgment was rendered against Wright, [\*269] \*was also included in the judgment against Smith; and claimed that, under the statute, nothing but the amount of the *disbursements* in the suit against Wright could be collected on the execution against him.

Plaintiff's attorney, in opposition to the motion, stated that when the executions were issued he was unable to give attention fully to business, and a direction to collect, according to the statute in such case, was inadvertently omitted. That on or about the 24th of August he saw the deputy sheriff who had the executions, and informed him that, if the execution against Smith was paid, he need only collect the disbursements of suit in the other, and would send him written directions in relation thereto, and accordingly on the 25th of August he sent such directions to the deputy sheriff to collect on the execution against Wright, \$6.60 only being the disbursements in case the Smith execution was paid.

On the 26th of August the papers for this motion were served on plaintiff's attorney. On the 31st of August plain-

American Print Works agt. Mayor, &c., of New-York.

tiff's attorney sent a letter to defendant's attorneys, stating the fact of the directions given to the deputy sheriff on the 24th and 25th of August, and requested them to withdraw the motion, which the defendant's attorneys in answer declined to do unless their costs were paid.

D. WRIGHT, *defendant's counsel.*

BEACH & BOCKES, *defendant's attorneys.*

J. A. MILLARD, *plaintiff's counsel and attorney.*

BRONSON, Chief Justice. The indorsement on the execution was corrected before the papers for this motion were served, and all is now right. Although the correction was not made until the papers had been prepared, I think it is not a case for giving the defendants costs of the motion. *Motion denied.*

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AMERICAN PRINT WORKS agt. MAYOR, &c., of New-York.

TAXATION OF COSTS.

*September Term, 1846.*

MOTION by both parties on appeal respectively from taxation of costs.

Judgment for the defendants was rendered respectively in the above cause, and in thirty-six other causes, in the superior court of the city of New-York, on the 1st of May, 1843, for costs in each cause. These judgments were entered in pursuance of a stipulation, entered into to make the decision of the thirty-seven causes dependent upon the decision of the case of Amos Lawrence and others against the same, defendants likewise entered in the superior court, and upon which a writ of error was brought to the supreme court and subsequently carried to the court \*of errors. The ques- [\*270] tions being the same in the thirty-seven causes as in the Lawrence case. The stipulation provided that either party should be at liberty to enter up judgment in the supreme court by a common rule, upon the stipulation, in accordance

American Print Works agt. Mayor, &c., of New-York.

with the judgment of the court, to be made in the Lawrence case; but if a writ of error should be brought by either party upon the judgment of the supreme court, in the Lawrence case, no proceedings should be had upon the judgment in the supreme court in the thirty-seven causes, until the decision of the court of errors in the Lawrence case.

The judgment of the superior court, in the Lawrence case, having been affirmed by the supreme court and the court of errors, the attorney for defendants in the thirty-seven causes claimed the right to enter up judgment in this court, on the stipulation, and made out a bill of costs in the above entitled cause (one of the thirty-seven) as follows:

“ Atty. and counsel retaining fee, .	\$8 00
Deducted on \$3. Dr. writ of error, \$1.50; 2 co-	
taxation. pies, \$1.50, . . . .	8 00
2. Dr. assignment of error, \$1; 2	
copies, \$1, . . . .	2 00
2. Dr. joinder in error, \$1; 2 co-	
pies, \$1, . . . .	2 00
Dr. costs, \$1; copy to serve, \$0.50,	1 50
Notice of taxing and service, . .	0 50
Taxation and attendance, . .	0 75
Drg. judgment record, . . . .	8 00
Judge signing same, . . . .	0 13
Clerk filing record, . . . .	1 00
Affidavit of disbursements, . .	0 63
.13 3 transcripts, .19; postage, .10;	
dockg., .19, . . . .	0 48
.35 Dr. execution, \$1; notice on	
same .25, . . . .	1 25
.13 Sheriff entg., 13; clerk entg., 13, .	0 26
Clerk entg. satisfaction, . . . .	0 13
	<hr/>
	\$24 63
	7 51
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Taxed at	\$17 12

American Print Works agt. Mayor, &c., of New-York.

Add interest on judgment of superior court up to time of taxation."

Plaintiff's attorney alleged, that judgment in the above cause was never removed by writ of error to the supreme court; that no writ of error was ever drawn or issued on behalf of the plaintiffs; that no \*assignment of [\*271] errors was ever drawn, filed or served, and no joinder in error was served; and that the cause had never existed in the supreme court.

The clerk of defendants' attorney made affidavit, that a writ of error, assignment of error and joinder in error were drawn, in the above cause, before the costs were noticed for taxation; and that forms of judgment records had been printed to be used in the thirty-seven causes in the supreme court, on the part of the defendants.

Plaintiff's attorney, on the taxation, objected: 1st, That no writ of error had ever been brought upon the judgment between the above parties in the superior court; no such cause as above entitled had ever existed in the supreme court, and that no costs should be taxed. 2d, That the charge of a counsel retaining fee was erroneous, there being no issue of fact or law. 3d, Affidavit of disbursements was unnecessary. All of which objections the taxing officer overruled.

Defendants' attorney alleged, as ground of his appeal, that the following items were disallowed and stricken out by the taxing officer, to wit:

Dr. writ of error, \$1.50 ; 2 copies, \$1.50, .	\$3 00
Dr. assignment of error, \$1 ; 2 copies, \$1, .	2 00
Dr. joinder in error, \$1 ; 2 copies, \$1, .	2 00

JAMES EDWARDS, *plaintiff's counsel.*

W. W. VAN WAGENEN, *plaintiff's attorney*

G. R. J. BOWDOIN, *defendants' counsel.*

J. T. BRADY, *defendants' attorney.*

BRONSON, Chief Justice. Both parties have appealed from the taxation; the defendants in error, because some of their

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Spaulding agt. Shepard.

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charges were disallowed by the taxing officer; and the plaintiffs in error, because the officer allowed too much. I think the defendants in error have no ground for complaint. If they drew writ of error, assignment and joinder in error, they were, under the circumstances, useless papers, and the charges for them were properly disallowed.

The counsel fee of \$5 was improperly allowed to the defendants in error, for the reason that no issue of law or fact had been joined in this court. From the nature of the case there could be no disbursements, and the 63 cents allowed for an affidavit of disbursements should also be stricken out.

On this appeal from taxation, the question, whether the defendants have the right and ought to be allowed to enter a judgment in this court, does not arise. *Ordered*, that the appeal of the defendants in error be dismissed; and on the appeal of the plaintiffs in error it is *ordered* that \$5.63 be deducted from the bill as taxed.

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[\*272] \*VOLNEY SPAULDING *et al.* agt. GUSTAVUS SHEPARD.

In an action of debt upon a *judgment in replevin*, the defendant may be held to bail as a matter of course, without any special order for that purpose. (*See 2 R. S., 2d ed., p. 270, § 8, Sub. 1.*)

*September Term, 1846.*

MOTION by defendant to vacate an order holding defendant to bail.

The papers showed that this suit was commenced by *capias* against the defendant to answer the plaintiffs in a plea of debt, upon a judgment awarded to the plaintiffs, at the circuit court of the county of Lenawee in the state of Michigan, in an action of replevin brought by the defendant against the plaintiffs.

The affidavit upon which the defendant was held to bail in this suit was made by the attorney for the plaintiffs, which recited the fact (from an exemplification of the judgment

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Gale agt. McAllister.

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record) of the replevin suit in Michigan, upon which affidavit an order was made to hold defendant to bail by Judge DAYTON, circuit judge of the eighth circuit. It appeared that the defendant was a person having a family, a householder, and a permanent resident of the village of Springville Erie county, N. Y.

M. T. REYNOLDS,, *defendant's counsel.*

R. GERMAIN, *defendant's attorney.*

P. CAGGER, *plaintiffs' counsel.*

H. GARDNER, *plaintiffs' attorney.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that the plaintiffs had a right to hold the defendant to bail under the statute, *without an order.* (2 R. S., 2d ed., p. 270, § 8, Sub. 1.)

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MOSES D. GALE and ADELIA his wife agt. ARCHIBALD  
MCALLISTER.

*Facts and circumstances*, for an order to hold defendant to bail, should be *fully, particularly and positively* stated in the affidavit. (See 7 Hill, 153; 1 Howard, 251; 2 id. 27, 110.)

*September Term, 1846.*

MOTION by defendant to vacate an order holding defendant to bail.

It appeared that this suit was an action for slander, commenced by *capias*, upon which was an order, endorsed by a supreme court commissioner, to hold the defendant to bail in the sum of \$500. A copy of the affidavit upon which the order was granted was not annexed to the papers; but the defendant's attorney in his affidavit stated the objectionable parts of it, as follows: "That the action is for an alleged slander, and the said Gale in his said affidavit first described the defendant as a merchant in Albion (which he is and in good standing), and this deponent further says that the said

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Gale agt. McAllister.

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Gale in his affidavit, after stating the alleged slander, proceeds to show a special cause for holding the defendant [\*273] to bail, as follows, \*to wit: " And deponent further says that he is informed and verily believes to be true, that said McAllister is worth little or no property, that the firm of Benedict & Tompkins, or Benedict & Williams, with whom said McAllister is reputed to be in partnership, failed last winter. Deponent further says, that he has had several conversations with said McAllister last fall and previous thereto, in which the said McAllister declared that if he failed in business he would put his property out of the reach of his creditors; that he would hold out to his creditors that he had failed, while he would have his money and property so fixed in a secret way that it could not be discovered by his creditors, and that he would dispose of himself so as to keep out of danger. Deponent has further been informed and believes to be true, that the said McAllister is arranging his business matters with the intention of leaving this state for the west, to reside there, and deponent verily believes that unless he is held to bail he will be in danger of losing the damages which deponent may obtain in an action for slander." Defendant's attorney stated that the above was all that was stated in the affidavit besides the alleged slander, to make a special cause for holding defendant to bail.

C. M. JENKINS, *defendant's counsel.*

W. R. McALLISTER, *defendant's attorney.*

A. TABER, *plaintiffs' counsel.*

H. D. TUCKER, *plaintiffs' attorney.*

Defendant's counsel cited 7 *Hill*, 153; 1 *Howard*, 251; 2 *id.* 27, 110.

BRONSON, Chief Justice. Held, that the affidavit upon which the defendant was held to bail was insufficient, and, *Ordered*, that the order to hold to bail be vacated, and that the bail bond be delivered up and canceled.



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Atwater agt. Williams.

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JOHN CONSTANTINE agt. JOHN S. VAN WINKLE.

On a motion for re-taxation of costs, the moving party should show affirmatively, *by affidavit*, how the bill was taxed, and what items were objected to, before the taxing officer. (*See 1 Howard, 136.*)

*September Term, 1846.*

MOTION by plaintiff for re-taxation of costs.

The plaintiff moved for re-taxation of costs in this cause, but did not produce any affidavit stating the objections before the taxing officer, or how the bill was taxed.

E. SANDFORD, *plaintiff's counsel.*SANDFORDS & PORTER, *plaintiff's attorneys.*M. T. REYNOLDS, *defendant's counsel.*A. H. WALLIS, *defendant's attorney.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that the moving party did not produce an affidavit showing how the bill of costs was taxed, before the taxing officer.

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\*SAMUEL T. ATWATER and EMANUEL RUDEN agt. [\*274]  
EZRA WILLIAMS imp'd with AMOS S. HUTCHIN-  
SON and AVERY M. CAMPBELL.

Where moving papers were alleged to have been wrongly entitled, and the opposing papers, which showed the defect in the entitling, were entitled in the same way; *held*, that the opposing papers could not be used to found such an objection upon.

*September Term, 1846.*

MOTION by defendant, Williams, that plaintiffs file security for costs.

Defendant, Williams, had obtained and served an order, that plaintiffs file security for costs, or show cause, &c.; and moved upon the papers upon which the alternative order was

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Newkirk agt. Steen.

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obtained, entitled as above. Plaintiffs' affidavit to oppose the motion was entitled in the same way.

D. WRIGHT, *defendants' counsel*.

J. B. LATHROP, *defendants' attorney*.

N. HILL, JR., *plaintiffs' counsel*.

W. H. GREEN, *plaintiffs' attorney*.

Plaintiffs' counsel insisted that the affidavit, on which the order to file security or show cause, &c., was granted, was wrongly entitled, and could not be read; for the reason that the plaintiffs' affidavits showed that Campbell, one of the persons named as impleaded, was dead, and therefore his name should not appear in the title of the cause.

Defendants' counsel insisted, first, that the objection was not well taken. Second, that plaintiffs' affidavits could not be used to prove the death of Campbell, as they were entitled in the same way.

BRONSON, Chief Justice. Held, that plaintiffs' affidavit, thus entitled, could not be used to found such an objection upon. *Motion granted*.

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ELIZABETH NEWKIRK agt. JACOB STEEN.

Where plaintiff brought ejectment for a dower right against the landlord, and was nonsuited on the trial, and judgment for costs entered, and subsequently brought the same action for the same premises against the tenant, the costs not having been paid in the suit against the landlord, and on motion by the landlord he was permitted to come in and defend the suit brought against the tenant, *separate and alone*, and if plaintiff obtained judgment against the tenant, proceedings thereon were to be stayed until the determination of the suit between the plaintiff and the landlord. And all proceedings on the part of the plaintiff against the landlord were ordered to be stayed until the costs of the former suit were paid; the landlord to admit on the trial that he was in possession of the premises at the time of the commencement of the suit against the tenant.

*September Term, 1846.*

MOTION on the part of Garret C. Newkirk for leave to come

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Newkirk agt. Steen.

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in and defend an action of ejectment in the place of defendant, Steen.

Plaintiff brought ejectment for a dower right against defendant for one-third of 150 acres of land. Defendant was tenant to Garret C. Newkirk, and \*was in [\*275] possession of all the premises in question except about twenty acres, which was in possession of Garret C. Newkirk.

Plaintiff had previously brought ejectment against Garret C. Newkirk, for her dower in the same premises; and, failing upon the trial to make out a right to recover, was nonsuited, and a judgment had been entered against her thereon. She had not paid the costs of that suit.

Garret C. Newkirk, the landlord, moved to be allowed to come in and defend this suit, Steen, the tenant, refusing to defend; also that all proceedings on the part of the plaintiff be stayed until the costs of the first suit were paid.

Garret C. Newkirk claimed the premises in question in fee.

D. WRIGHT, *counsel for G. C. Newkirk.*

H. & F. FISH, *attorneys for G. C. Newkirk.*

D. McMARTIN, *plaintiff's counsel.*

G. YOST, *plaintiff's attorney.*

BRONSON, Chief Justice. *Ordered*, that the landlord be allowed to come in and defend separately and alone. That if plaintiff obtained judgment against Steen, proceedings thereon to be stayed, until the determination of the suit between plaintiff and Garret C. Newkirk, and that all proceedings on the part of the plaintiff against Garret C. Newkirk be stayed until the costs of the former suit were paid, and that on the trial of the cause, Garret C. Newkirk admit that he was in possession of the premises at the time this suit was commenced.

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Clapp agt. Stevens.

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WILLIAM GRIFFING agt. JOHN R. THURMAN.

It is not necessary to state, in an affidavit for judgment as in case of nonsuit, what the cause of action is.

*September Term, 1846.*

MOTION by defendant for judgment as in case of nonsuit.

Defendant moved for judgment as in case of nonsuit, after stipulation, upon an affidavit which did not state what the cause of action was, but was in the usual form, showing that issue was joined, &c., and that the cause was not noticed for trial, nor tried in pursuance of the stipulation.

H. B. NORTHUP, *defendant's counsel and attorney.*

E. H. ROSEKRANS, *plaintiff's counsel and attorney.*

Plaintiff's counsel insisted that the affidavit was insufficient; it should have stated the cause of action; it might be that the action was replevin, in which case defendant could not move for judgment as in case of nonsuit.

BRONSON, Chief Justice. Held, the affidavit was sufficient, and there being no excuse shown, the motion was *granted*.

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[\*276] \*BENJAMIN CLAPP agt. ALDEN S. STEVENS.

A motion to change the venue will be denied with costs, where it appears that the defendant's default has been entered for not pleading. (*See ante*, p. 134.)

*September Term, 1846.*

MOTION by defendant to change the venue.

Defendant moved to change the venue from New-York to Wyoming.

Plaintiff showed that defendant's default had been entered in the cause for not pleading. It appeared from the papers that the default was entered on the 7th of July last, and that the papers for this motion were served on the 2d of July last.

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Brown agt. Seys.

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J. H. COLLIER, *defendant's counsel.*

M. FARNHAM, *defendant's attorney.*

A. TABER, *plaintiff's counsel.*

TUCKER & JAMES, *plaintiff's attorneys.*

BRONSON, Chief Justice. Denied the motion with costs, on the ground that defendant's default had been entered.

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GEORGE S. BROWN agt. JOHN SEYS.

It is not necessary to show, in an affidavit for motion to change venue, or for a commission, that the advice of counsel, as to the materiality of the witnesses, was given after the defendant had stated his case, and disclosed what he expected to prove, &c. (*The case of Lansing agt. Mickles*, 1 *Howard*, 248, overruled.)

*September Term, 1846.*

MOTION by defendant to change the venue, and for commissions.

Plaintiff's counsel objected to the sufficiency of defendant's affidavit, for the reason that it did not show that the advice of counsel, as to the materiality of the witnesses, was given after the defendant had stated his case and disclosed what he expected to prove, &c. (He cited 1 *Howard*, 248.)

That part of defendant's affidavit which embraced the objection read as follows: "And this deponent further says, that John Dikeman, of the city of Brooklyn, in the said county of Kings, is this deponent's counsel in this cause; that this deponent has fully and fairly stated his case in this cause to his said counsel, and that he, the deponent, has a good and substantial defence on the merits in this cause, as he is advised by his said counsel and verily believes. And deponent further says (naming the witnesses) are each and every of them material witnesses for this deponent to his defence in this cause, as he is advised by his said counsel and verily believes; that this deponent hath disclosed to his said counsel the facts which he expects to be able to prove by each and every of his

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Rogers agt. Latson.

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said witnesses, and that, without the benefit of the testimony of each and every of the said witnesses, he, the deponent, cannot safely proceed to the trial of this cause, as he is also advised by his said counsel and verily believes to be true."

[\*277] \*G. R. J. BOWDOIN, *defendant's counsel*.

J. DIKEMAN, *defendant's attorney*.

H. B. NORTHUP, *plaintiff's counsel and attorney*.

BRONSON, Chief Justice. Held, that the affidavit was sufficient in substance, and fairly imported that the advice was given at the proper time.

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#### HIRAM ROGERS agt. JOHN W. LATSON:

Where defendant seeks to be let in to defend a suit, where an inquest has been taken against him, and judgment entered, execution issued, and levy made, and it appears the plaintiff has been regular, he must show a *good excuse*.

Where defendant stated he left his place of residence in great haste, for a long journey, a few days previous to the circuit, and inadvertently omitted to request his attorney to employ counsel—at the place where the circuit was held—to defend the suit; *held*, insufficient, although he had filed and served an affidavit of merits, and swore to merits on the motion; the motion was *denied with costs*.

*September Term, 1846.*

MOTION by defendant to set aside verdict, or for leave to come in and defend.

The cause was noticed for trial and inquest, for the Herkimer circuit, the first Monday of April last. Defendant resided in the city of New-York; plaintiff resided in Herkimer county, where the venue was laid. Action, *trespass de bonis asportatis*, for taking timber, logs and lumber. Defendant filed and served an affidavit of merits. On the last day of the circuit, or the last but one, the cause was called on the calendar by the circuit judge; and no one appearing for the defendant, plaintiff took an inquest, and entered judgment

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Rogers agt. Latson.

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upon the verdict, on the 9th day of April, for \$321.90. The verdict was for \$259.52. Defendant alleged that that amount was over \$100 more than the value of the property alleged to have been taken. Plaintiff's papers contained a full and particular statement of the whole claim; and alleged the verdict was for the just amount due. Costs were taxed on notice to defendant's attorney. Execution issued and levy made.

Defendant stated his execution to be let in to defend, as follows: "that for some time prior to the 3rd of April last, deponent had contemplated leaving the city of New-York for St. Louis and other places beyond there, upon urgent business; that though he had contemplated leaving the city, his departure at the time he did leave was unexpected; that on the third day of April last, this deponent left the city of New-York and went to the state of Missouri, and did not return until the fourth or fifth day of June instant (1846); that before leaving, deponent intended, through his attorney, who resides in the city of New-York, to have employed counsel in Herkimer county, to have defended the suit; but, in his haste in leaving \*the city of New-York for the [\*278] west, he inadvertently omitted to leave instructions with his said attorney; that, in consequence thereof, no one appeared on behalf of this deponent at the trial of said cause." Defendant swore to merits in the same affidavit.

E. S. CAPRON, *defendant's counsel.*

C. C. MARSH, *defendant's attorney.*

P. CAGGER, *plaintiff's counsel.*

BENTON & BARRETT, *plaintiff's attorneys.*

BRONSON, Chief Justice. Held, that the defendant's excuse was insufficient; no wrong had been done by the judgment.

*Motion denied with costs.*

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Brodhead agt. Stanton.

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EDGAR BRODHEAD *et al.* agt. HENRY STANTON and WILLIAM P. STANTON.

One defendant, served with declaration, may move for a change of venue as to him, where the other defendant was not served; although the last mentioned defendant may have been served before the motion was made.

The same formality is required, in an affidavit to *oppose* the motion, as is required in making a motion to change the venue.

*September Term, 1846.*

MOTION by William P. Stanton to change the venue.

William P. Stanton, one of the defendants, moved to change the venue from the city and county of New-York to the county of Monroe; Henry Stanton, the other defendant, not having been served with a copy declaration at the time the motion was noticed. The action was assumpsit for a bill of goods and merchandise, sold and delivered by the plaintiffs to the defendants in the city of New-York.

Plaintiffs alleged, that the defence in the suit was limited to the question of the quality of a barrel of winter sperm oil, and did not extend to any other articles of the goods sold, or to any other question in the cause. Plaintiffs' counsel objected to the motion: that one defendant could not move to change the venue; that all the defendants should join in the motion.

An objection was taken by defendants' counsel to the sufficiency of the plaintiffs' (opposing) affidavit; to wit: that it did not state that plaintiff had fully and fairly stated the case to his counsel, &c., and had fully and fairly disclosed the facts and circumstances which he expected to prove by each and every of the witnesses named, &c.

That part of the affidavit to which objection was taken read as follows: "And deponent further says, that (naming 14 witnesses), each and every of whom reside in the city and county of New-York aforesaid, are each and every of them material witnesses for the plaintiffs in this cause.

[\*279] \*as deponent is advised by E. L. Fancher, the plaintiffs' counsel in said cause, who resides in the city



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Snyder agt. Hearman.

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and county of New-York, and as deponent verily believes; and that, without the benefit of the testimony of each and every of the said witnesses, the plaintiffs cannot safely proceed to trial, as they are advised by said counsel and as deponent verily believes."

The affidavit then stated, "that the witnesses were material, as follows," giving the names of the witnesses, and certain facts which they were to prove respectively.

Plaintiffs' counsel insisted, that it was not necessary, in an affidavit to oppose a motion to change the venue, to state the matters as formally as was required in an affidavit for the motion; and that, at any rate, the defect was cured in this case by the plaintiff's disclosing the facts and circumstances in detail which he expects to prove by the witnesses.

M. T. REYNOLDS, *defendants' counsel.*

C. NASH, *defendants' attorney.*

F. S. EDWARDS, *plaintiffs' counsel.*

E. L. FANCHER, *plaintiffs' attorney.*

BRONSON, Chief Justice. *Held*, that where one defendant was served with declaration, and the other not served, the defendant served might move at once to change the venue; and if the other defendant should be served before motion made, the venue would be changed as to the defendant moving.

In regard to the objection to plaintiffs' affidavit, *held*, that the affidavit was defective; that the same formality was required, in an affidavit to oppose a motion to change a venue, as in making the motion. *Motion granted.*

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ANDREW SNYDER agt. JACOB HEARMAN and CHARLES HEARMAN, administrators, &c., of COONRAD HEARMAN, deceased.

Defendant can not both *plead* and *demur* to the same part of the declaration. Where a declaration is held sufficient and the demurrer irregular and frivolous, defendant can not have leave to amend. (*See the case.*)

*September Term, 1846.*

MOTION by plaintiff to strike out defendants' demurrer with costs.

This was an action of debt on a bond executed by Coonrad Hearman to the plaintiff in the penalty of \$500, recited and conditioned as follows: "Whereas it is said that Jacob Hearman, late of the town of Pittstown, in the county of Rensselaer, deceased, did in his will give a legacy of five hundred dollars to his daughter Mary, and also did in his will, said to be his last will and testament, give to her, the said Mary, a legacy

which was to consist of one-fourth part of his personal estate, and that either his son Coonrad, or his daughter Esther, taking care and supporting her, the said Mary, should have the legacy which is bequeathed to her, the said Mary, in and by either of the aforesaid wills: *Therefore*, the condition of this obligation is such, that if the above bounden Coonrad Hearman, his heirs, executors, or administrators, do, and shall, from time to time and at all times hereafter, well and truly maintain and support, or cause the same to be done her, the said Mary, during her lifetime, both in sickness and in health, in a decent and becoming manner, then this obligation to be void—otherwise to be and remain in full force and virtue."

The declaration contained a single count, setting out the bond recital and condition and assigning as breaches thereof:

1. That although the said Mary, the daughter of the said Jacob Hearman, deceased, in the condition of the said writing obligatory named, had ever since the death of the said Jacob Hearman been, and then was, in full life, at Pittstown aforesaid, whereof the defendants, as administrators aforesaid, always then had notice, yet the said defendants, administrators as aforesaid, since the death of the said Jacob Hearman, although they were requested by the plaintiff so to do, had not, during the life of the said Mary, maintained and supported her, the said Mary, in sickness and in health, in a decent and becoming manner, nor caused the same to be done according to the form and effect of the said writing obligatory, and of

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Snyder agt. Hearman.

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the said condition thereof, but on the contrary said defendants, administrators as aforesaid, since the death of the said Coonrad Hearman, for a long space of time during the life of the said Mary, to wit, from the first day of August, 1844, hitherto had wholly neglected and refused, and still neglected and refused so to do, to wit, at Pittstown aforesaid, contrary to the form and effect of the said writing obligatory, and of the said condition thereof, to the plaintiff's damage, of \$500.

2. That although the said Mary, the daughter of the said Jacob Hearman, deceased, in the condition of the said writing obligatory named, had ever since the death of the said Coonrad been, and then was, in full life, at Pittstown aforesaid, whereof the said defendants, as administrators as aforesaid, always then had notice, yet the said defendants, administrators as aforesaid, since the death of the said Coonrad Hearman, and although they were requested by the plaintiff so to do, had not, during the life of the said Mary, maintained and supported her, the said Mary, in sickness and in health, in a decent and becoming manner, nor caused the same \*to be done according to the form and effect of the [\*281] said writing obligatory, and of the said condition thereof, but on the contrary, the said defendants, administrators as aforesaid, since the death of the said Coonrad Hearman, for a long space of time during the life of the said Mary, to wit, from the 1st day of August, 1844, hitherto had wholly neglected and refused, and still did neglect and refuse, in consequence of which said neglect and omission of the said defendants, administrators as aforesaid, to support and maintain the said Mary, the said plaintiff then and there became liable for the amount thereof, to wit, the sum of \$500; and alleged that by means of the said several premises, the said writing obligatory became forfeited, and an action had accrued to demand and have of and from the said defendants, administrators, as aforesaid, the said sum of \$500, which they, as such administrators, since the death of the said Coonrad Hearman, although requested, had not paid, but had refused so to do, to the said plaintiff's damage, of \$500.

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Form of Bond for Security of Costs.

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To the declaration the defendants interposed a plea of *non est factum* and a general demurrer, which was written underneath the plea, and assigned as special causes of demurrer :

*First*, that said declaration did not show that the said Mary Hearman, mentioned in said declaration, is deceased, but, on the contrary, shows that she was alive at the time of the commencement of the said suit.

*Second*, that the said declaration did not show whether the said Coonrad Hearman did or did not, from the time of the date of the said bond mentioned in said declaration to the time of his decease, maintain and support, or cause to be maintained and supported, the said Mary Hearman.

*Third*, because it did not appear from said declaration that the said plaintiff gave any consideration for said bond, or had any interest in it; and that the breach assigned did not show or set forth how the said plaintiff became liable for the support of the said Mary Hearman.

The plaintiff moved to strike out the demurrer as irregular and frivolous.

J. ROMEYN, *plaintiff's counsel*.

SEYMOURS & ROMEYN, *plaintiff's attorneys*.

J. E. TAYLOR, *defendants' counsel and attorney*.

BRONSON, Chief Justice. *Granted* the motion with costs, on the ground that it was not competent for the defendants to both plead and demur to the same part of the declaration.

*Held*, also, that the declaration was sufficient and the demurrer frivolous; therefore refused the defendants leave to amend.

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[\*282] \*FORM OF A BOND FOR SECURITY FOR COSTS, under the act entitled "*An act relating to excise and to licensing retailers of intoxicating liquors*," passed May 14, 1845.

The following was a suit commenced under the act above mentioned, in the county of Albany. A motion was made at the February special term, 1847,

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Walley agt. Leonard.

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to set aside the declaration and proceedings in the cause, on the ground that the bond for security for costs filed was informal and insufficient.

Mr. Justice BEARDSLEY, who held that term, took the case under advisement, and on the 5th of March, 1847, made the following order, which is published herein, at an early period, for the benefit of the profession, as a *proper form* for the bonds in such cases.

JACOB WALLEY and ADAM SPAWN, Overseers of the Poor of the town of Bethlehem, agt. JOHN D. LEONARD.

*September Term, 1846.*

ROBINSON & TYLER, *attorneys for motion.*

ALLEN & HASTINGS, *attorneys opposed.*

AFTER hearing counsel for both parties, on plaintiffs' motion to set aside the declaration in this cause and all subsequent proceedings, security for plaintiffs' costs, in manner and form required by law, not having been filed: *Ordered*, that the motion be granted, unless the costs of the plaintiffs in making said motion be paid within twenty days. And also, unless security for the payment of the costs of said cause be filed with the clerk of this court, in Albany, within the same time; *the obligation for the payment of said costs must be made to the plaintiffs by name, as overseers of the poor of the town of (Bethlehem). Said obligation also to state the pendency of this suit, and by what persons or person it was and is prosecuted: also, that said suit was intended to be commenced and prosecuted in pursuance of the seventh section of the act entitled "An act relating to excise, and to licensing retailers of intoxicating liquors," passed May 14, 1845. It must also state and declare, that the persons executing said obligation thereby covenant, promise and agree, to and with the said overseers, that the said persons or person by whom said cause was commenced (who are to be named) shall pay all costs on the part of the defendant, as well as on the part of the plaintiffs, if said persons or person who commenced said cause (and who are to be named) shall fail to recover judgment; and that they, the said persons so executing said obligation, shall and will indemnify and save harmless the said plaintiffs of and from all such costs as aforesaid; said obligation to be executed by at least*

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Walley agt. Leonard.

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*two persons, under their hands and seals, and who must, severally, make affidavit that they are residents of said town of (Bethlehem), and householders, and that they are worth more than five* [\*283] *hundred dollars over and \*above all debts. Notice that said bail has been filed is also to be given within said twenty days; and if said security shall be so given and filed, and notice given and costs paid within said twenty days, then the motion is to be denied. As it does not appear, by the papers in the cause, by whom the cause was directed to be commenced, the plaintiffs, if the costs of this motion are not paid, or if necessary for any other purpose, may apply for redress against the persons or person by whom the said suit was commenced; or, if no person can be ascertained, then against the attorney who prosecuted the same; the said plaintiffs may also apply to the court, if dissatisfied with the sufficiency of the security which may be filed.*

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